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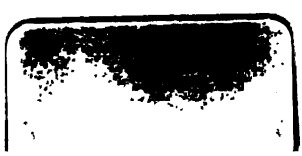

CASES

DECIDED IN

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FROM

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REPORTED BY

PATRICK SHAW AND ALEX. DUNLOP JUN.
ESQUIRES, ADVOCATES.

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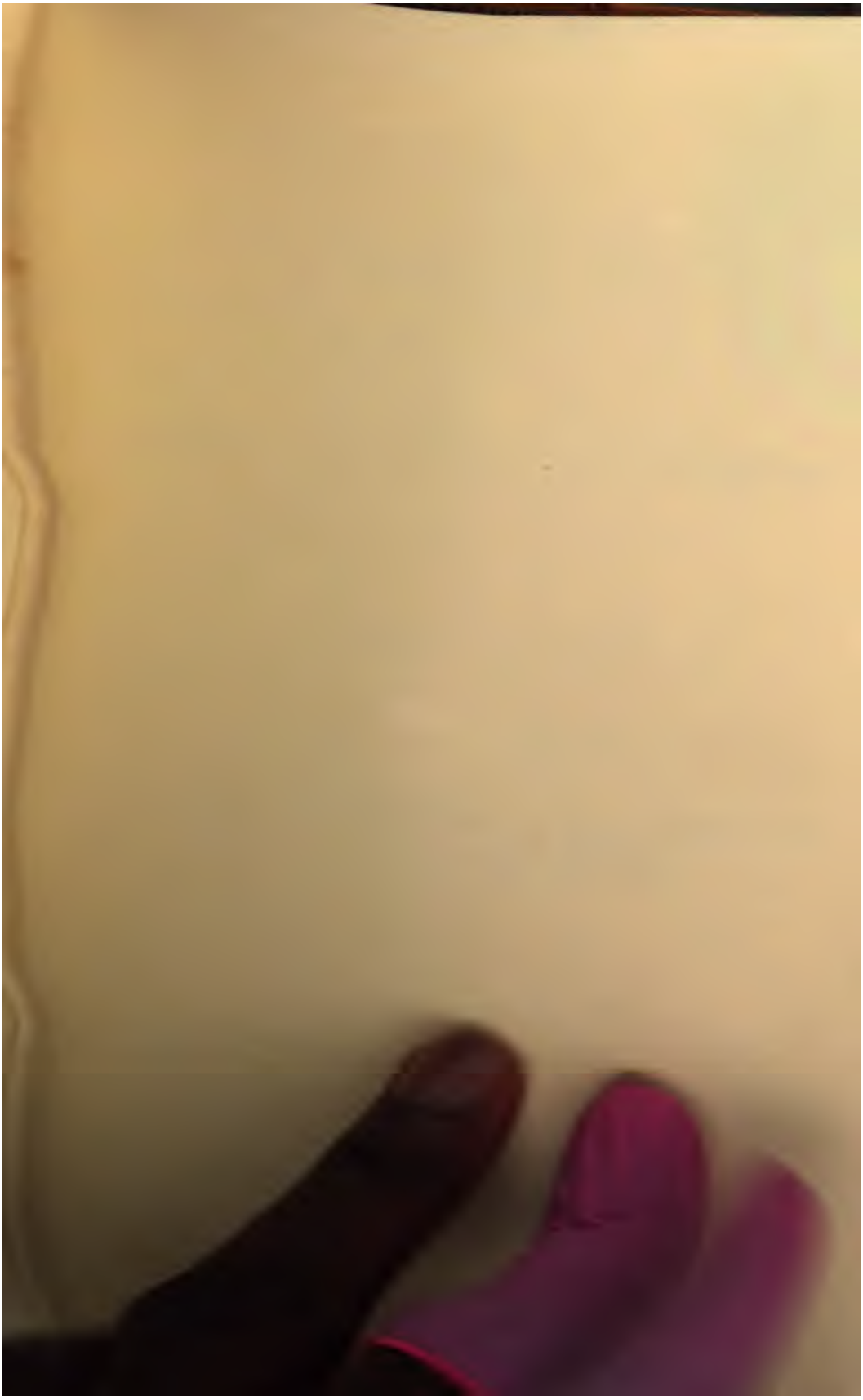

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OF THE

COURT OF SESSION

DURING THE PERIOD OF THESE REPORTS.

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Lord Craigie.
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SECOND DIVISION.

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INDEX OF MATTERS

IN

VOLUME V.

ABSOLUTE AND REVOCABLE.—See *Right, Absolute and Revocable.*

ACCOUNT, SETTLED.—See *Settled Account.*

ACCUMULATION OF ACTIONS.—See *Process*, I. 8.

ACQUIESCENCE.—See *Burgh Royal*, 1.—*Entail*, 5.

ADJUDICATION.

1. No ground for staying intimation of a first adjudication, that the debtor had executed a trust-deed of all his heritable property for behoof of his creditors, on which the trustees had taken infeftment, No. 224. p. 374.

2. A party having acquired right as principal tacksman to a long lease, and his name having been entered in the rental-book of the proprietor, and having subset part of the subject, and thereafter obtained a renunciation and reconveyance of the sublease, held preferable to a creditor adjudging in virtue of a bond and assignation in security granted subsequently by the subtenant, No. 120. p. 200.—See *Burgh Royal*, 3.—*Prescription*, 5.

ADMISSION, QUALIFIED.—See *Proof*, I.

AGENT AND CLIENT.

1. Agent in a cause for a party in whose favour expenses have been awarded, not entitled to object to deduction of a sum of expenses in which his client had been found liable at a previous stage of the proceedings, No. 37. p. 49.

2. Circumstances under which an agent who had been advised by counsel to prepare a summons in a particular form, and which was found erroneous, was entitled to payment of his account, although instructions to a different effect had been given, No. 164. p. 275.

3. In an action by a law agent under a sequestration against a creditor for payment of his account, held not a sufficient defence that instructions had been given by the creditors to the trustee, and inserted in the sederunt-book by the agent, to raise an action for a debt, and obtain a vendition of the share of a ship, which not having been done, the debt and price of the share had been lost—there being no evidence that he had received instructions from the trustee to take such steps, No. 251. p. 502.—See *Sequestration*, 11.

AGENT AND CLIENT.

4. The executors of a client having insisted that the business accounts of his agent for a series of years, which had been rendered and not objected to, but which had not been docqueted, should be audited; and the agent having been in a great part successful, both in relation to the amount of the charges, and to other litigated points—Held,

(1.) That he was entitled to modified expenses.

(2.) That it was not an objection to decree going out in the name of the agent in the cause, who had appeared as such from the commencement, that the party himself (who was a practitioner before the Court) had chiefly taken the management of the process, No. 265. p. 521.

5. Law agent found liable for the loss arising from an heritable security not having been effectually completed, No. 442. p. 903.—See *Attorney's License—Interest*, 1—*Prescription*, II. 4.—*Process*, I. 4.

ALIMENT.—See *Husband and Wife*, 5.

APPEAL.

1. A party having made a deed of settlement, conveying his whole heritage, and particularly two pieces of land; and it having been found by the House of Lords, that although he was facile, yet he had a capacity to dispone, provided he were sufficiently informed as to the nature of the deed, but that he had not been so as to the lands; and having set aside the deed quoad the lands; held not competent to extend the judgment to other heritable subjects, No. 14. p. 22.

2. Circumstances under which leave to appeal was refused, No. 235. p. 417. No. 236. p. 418. and No. 301. p. 671.

3. Held incompetent to entertain an objection to the validity of a judgment of the House of Lords, that although it bore that the party had appeared and been heard, yet in point of fact he was dead, No. 354. p. 751.

APPEAL, EXECUTION PENDING.

Held incompetent for a Lord Ordinary to transfer against an executrix, a warrant issued against a defunct for interim execution pending appeal, No. 321. p. 696.

APPRENTICE.

1. A master currier having ceased to take out the licence required by certain acts of Parliament—Held,

(1.) That he was not entitled to enforce the penalty in the indenture of an apprentice, whom he alleged to have violated his agreement; and,

(2.) That the apprentice was entitled to be freed from the indenture, though actually receiving instruction in the trade, No. 4. p. 3.

ARBITRATION.

1. Circumstances in which it was held,

(1.) That a decree-arbitral could not in part be sustained, and in part set aside.

(2.) That an ex parte explanation by the arbiter, after pronouncing his award, is ineffectual.

ARBITRATION.

(3.) That a reference forming part of an agreement did not fall by the decree pronounced being inept; but,

(4.) That the referee chosen may, by his conduct, disqualify himself from again deciding, No. 90. p. 140.

2. A submission forming part of an agreement, held not to fall by an omission to prorogate within the year, No. 96. p. 154.

3. Arbiters under a submission, which empowered them to pronounce interim decrees, and declared that although the submission should expire as to points on which they differed in opinion, it should still continue as to those on which they agreed, having pronounced two interim decrees, copies of which only were delivered to the parties, the principals remaining in the hands of the clerk; and having afterwards declared the submission terminated, and declined to pronounce any deliverance on a memorial by the clerk as to a demand made by one of the parties to have the interim decrees put on record—Held that the decrees were invalid, No. 347. p. 735.

4. A submission having been entered into without any limitation in point of time, and not containing the usual blank clause applicable to the endurance; and the parties having, after the expiry of a year, gone on pleading and leading proof before the arbiters and oversman—Held, in a reduction of a decreet-arbitral afterwards pronounced,

(1.) That the submission did not fall by the lapse of the year; and,

(2.) That at any rate the parties had prorogated it by their conduct, No. 445. p. 906.

ARRESTMENT.

1. Held that the arrester is in no better situation than the common debtor, and that he cannot recover where the common debtor could not do so, No. 52. p. 74.

2. Held that the salary of an extractor of the Court of Session is arrestable, No. 459. p. 926.—See *Jurisdiction—Poinding—Process*, V. 7.

ARRESTMENT JURISDICTIONIS FUNDANDÆ CAUSA.—See *Jurisdiction*, I. 3.

ASSIGNATION.

Circumstances under which it was held that an assignation of the share of a lease, forming part of the stock of a partnership, by one partner to another, does not require formal intimation to complete it, in order to make it effectual against the creditors of the cedent, No. 433. p. 891.

ATTORNEY'S LICENSE.

1. Circumstances in which decree was allowed to go out for expenses of a process conducted by an unlicensed attorney, who had afterwards taken out certificates under the 7th Geo. IV. c. 44, No. 140. p. 234.

2. The executor of a writer to the signet having obtained decree in absence for certain business accounts, and a reduction having been brought, in the course of which it was alleged that the writer had not taken out his attorney license during the currency of the

ATTORNEY'S LICENSE.
accounts, whereby he had no right to recover payment—Held competent for the executor, pending the process, to pay the arrears of duties under the statute 7th Geo. IV., and thereby remove the objection, No. 229. p. 388.
3. Held that an unlicensed agent acting as agent in his own cause, and who has got decree for expenses, cannot recover more than his outlays, No. 296. p. 658.

BANKRUPT.
1. A partner and manager of a company having discounted bills belonging to the company for its behoof, and being indebted privato nomine to the company in a sum which he ought to have paid or entered to that effect in his account with the company, and having retired the bills within 60 days of his bankruptcy as an individual, whereby his debt to the company was extinguished, and of which he made an entry in their books—Held, that as it was his duty prior to the 60 days to have paid the debt, whereby funds belonging to the company were in his hands as manager sufficient to retire the bills, the transaction was not reducible on the act 1696, c. 5, No. 171. p. 293.
2. (1.) Held, on a remit from the House of Lords, and altering the previous judgment in the cause, (ante, Vol. IV. No. 74.) that a payment in cash by a bankrupt, within 60 days from his bankruptcy, to an indorser of a bill accepted by the bankrupt but not then due, 'as a provision for payment of the said bill when it be-'came due,' is reducible under the act 1696, c. 5, independent of fraud at common law.
(2.) Question raised, but not decided, whether, on a simple remit to review, it be competent to award expenses in the House of Lords, No. 344. p. 729.—See *Sequestration—Trust*, 2. 3. 5.

BASTARD.—See *Proof*, IV.—*Marriage*, 1.

BILL OF EXCHANGE.
1. Held that the presumption of onerosity in favour of the holder of a bill blank indorsed, and delivered subsequently to its dishonour, and after diligence had been raised, can only be redargued by writ or oath, No. 127. p. 208.
2. A party having been charged as payee and indorsar of a promissory note, but not being designed on the face of it, and his designation having been without authority inserted in the diligence, and he denying that he was a party to the note, and it appearing, comparatione literarum, that the indorsation was not his signature, the letters were suspended simpliciter, No. 189. p. 318.
3. A bill drawn in Scotland upon and accepted by a party in England, is an English debt, quoad a Scotch indorsee, equally as in a question with the acceptors, No. 323. p. 700.
4. A party having granted a promissory note, payable to the creditor of another party, and that party having delivered it for value to the creditor—Held, that although the creditor had not given value to the granter, yet he was entitled as an onerous holder to recover payment from him, No. 360. p. 773.
5. Non-onerosity of indorsee only proveable by writ or oath, No. 373. p. 794.

BILL OF EXCHANGE.

6. Held that there being no lawful evidence of fraud against the holder of a bill, he is entitled to the ordinary privileges of a holder, No. 376. p. 796.

7. Circumstances in which, although a party admitted that he had granted a promissory note, which was prescribed, and that he had not paid it, yet, having denied that it was ever intended to constitute a debt against him, was found not liable for the debt, No. 394. p. 820.

8. A joint acceptor of a bill holding a letter of relief from two co-acceptors, having retired it in part, and received two other bills from them for the amount so paid by him—Held, in an action at his instance, founded both on the letter of relief and these bills,

(1.) That his claim was not barred by the sexennial prescription, or the vitiation of one of these bills; and,

(2.) That the presumption that a partial payment, marked generally by the holder of a bill which had been discounted, had been made by the acceptor, may be redargued by a special receipt in favour of the drawer when the bill was finally retired, No. 422. p. 876.—See *Proof*, III. 1. 2. 3. 5.

BONA FIDES.—See *Prescription*, 2.

BURGH ROYAL.

1. A singular successor to a property in a town is not entitled to insist on the removal of a well erected in front of it by the Magistrates for the public convenience, except in so far as it encroaches on his private property, it having stood without objection for 35 years, No. 155. p. 261.

2. A petition and complaint against the election of Magistrates having been presented in name of a party who was a native Scotsman, a resident burgess, and a constituent member of the meeting for election, but who at the date of the complaint was abroad, and no mandatory having concurred—Held,

(1.) That it was incompetent at his instance; and,

(2.) That a party who had appeared and litigated the case as a respondent, could not sist himself as a complainer, No. 253. p. 505.

3. A Royal Burgh having become insolvent, and a decree of adjudication of its whole property having been obtained in foro by a creditor—Held, in a ranking and sale brought by the creditor,

(1.) That the decree of adjudication was not such a res judicata as to prevent the Magistrates from opposing the sale of certain parts of the property which had been adjudged.

(2.) That the Crown had right to appear and object to the sale of the jail and town-house; and,

(3.) That it is incompetent for creditors to sell the jail and town-house, with its steeple and its bell, or the petty customs of a Royal Burgh, No. 317. p. 690.

4. In a disputed election of the Deacon and Colleague of an Incorporation of a Royal Burgh—Held that the votes of persons regularly qualified to be admitted freemen, and only for the first time admitted on the day of election, were not objectionable on the ground of temporary non-residence in the interval between the

expiry of their apprenticeship and the date of admission, No. 358. p. 749.—See *Jurisdiction*, 2.—*Process*, 3. 5.

CANAL.—See *Road Acts*, 4.

CAUTION, JURATORY.—See *Juratory Caution*.

CAUTIONER.

1. Circumstances under which it was held that a principal debtor was bound to relieve his cautioner, without abiding the discussion of certain alleged counter claims, No. 33. p. 47.
2. Held that cautioners for the trustee on a bankrupt estate were relieved by the gross negligence of the commissioners and creditors in superintending and controlling the conduct of the trustee, No. 74. p. 111.
3. Held that where a cautioner for a trustee has been found not liable for his misconduct in respect of the gross negligence of the commissioners and creditors, it is not relevant to allege that the claim of a creditor had been rejected and was under discussion, and so could not interfere in the management of the estate, in respect he was not thereby deprived of his control over the conduct of the trustee, No. 75. p. 115.
4. A Bank having granted a cash-credit, to be operated on by a company consisting of three partners, on security of a bond, to which the company, and the individual partners as such, and as individuals, were parties, and having continued to make advances to the company after the retirement of one of the partners, duly notified in the Gazette, and specially to the Bank—Held that the retired partner was not liable under the bond for a balance arising on advances so made, No. 109. p. 175.
5. Held,

   (1.) That an improbative cautionary missive for a tenant is rendered binding by the tenant being put into possession on the faith of it.

   (2.) That a landlord does not lose his recourse against cautioners by neglecting to enforce his right of hypothec; and,

   (3.) That cautioners for a tenant 'for the first three years rent of 'a subset,' are not freed in consequence of no written lease for a definite period of longer endurance having been granted, No. 188. p. 317.
6. Parties having bound themselves as cautioners for a tenant, but stipulated that the landlord should exercise his right of hypothec before having recourse on them; and he having sequestrated the tenant's effects, but it being alleged that he had delayed to sell them—Held that the cautioners were liable, No. 290. p. 597.
7. A party having interposed as cautioner for two distressed cautioners in a debt, which was settled by dividing it into two equal parts, and granting a promissory note for each half; and the interposing cautioner having put his name on both—Held entitled to relief from one of the original cautioners, who alleged that he had interposed for the other cautioner alone, No. 341. p. 726.
8. A cautioner bound himself to pay for goods purchased by another within three months, and goods having in consequence been sold within that time, and a bill for the amount, payable at a period subsequent to it, having been taken from the purchaser; and when

CAUTIONER.
it fell due, another having been received by the latter, but the original bill having been retained—Held that the cautioner was liable to pay the debt, No. 361. p. 774.
9. Held that the cautioners of a messenger, who has been guilty of negligence in executing a summons, cannot be subjected in payment of the debt, until it has been constituted against the debtor, No. 184. p. 311.—See *Foreigner*.

CESSIO BONORUM.
1. An opposing creditor in a cessio bonorum, having failed to prove allegations of fraud brought by him against the bankrupt, found liable in the expenses of the proof, No. 71. p. 108.
2. A judgment granting the benefit of cessio having been pronounced in absence of the creditors, where all the procedure had been regular, held not subject to review, No. 121. p. 201.
3. Held not necessary, in peculiar circumstances, for the pursuer of a cessio, against whom a writ of extent had issued, to call the Officers of the Crown as defenders, No. 168. p. 291.
4. A cessio refused to the father of a bastard child, who was incarcerated by the mother for payment of aliment, No. 255. p. 508.
5. A pursuer of a cessio having been incarcerated for the full period of a month, and being ready to appear and submit himself to the orders of Court—Held no objection to his title to pursue that he was not in jail at the date of raising the summons, No. 267. p. 525.
6. Warrant granted, without caution, for liberation of a debtor incarcerated in a provincial jail, who had obtained judgment awarding the benefit of cessio, but whose oath could not be reported before the rising of the Court, in consequence of the roads being blocked up with snow, No. 287. p. 565.
7. A party who had illegally appropriated to himself funds belonging to his employer, and spent them, refused the benefit of the cessio, although he had suffered 18 months imprisonment, No. 325. p. 703.—See *Diligence, Legal*, 1.

CHURCH.
Circumstances under which an heritor who had paid his share of the assessment for rebuilding a parish church, was found liable in a share of the expenses and interest arising on bills granted and repeatedly renewed by a committee of the heritors for a deficiency occasioned by several heritors having failed to pay their shares, No. 356. p. 761.

CHURCH SEAT.
Circumstances in which a bill of suspension and interdict against occupying a seat in church passed, No. 28. p. 42.

CITATION.
Circumstances under which a party was allowed to found on a service copy to show that the citation was erroneous, No. 451. p. 915.

CITY.—See *Road Acts*.

CLAUSE.—See *Testament—Trust*, 9.—*Warrandice*, 3.

CLERK OF COURT.—See *Justice, Administration of*, 1.—*Sheriff-Clerk*.

COAL.

Circumstances in which a party holding in lease two fields of coal at some distance from each other, together with a right to the use of a level belonging to the lessor for the purpose of working these fields, found liable to pay the lessor a consideration for the benefit derived by him, in consequence of carrying the level through certain intermediate fields of his own, in order to make the communication to the upper coal-field let to him by his lease, No. 96. p. 154.—See *Servitude*.

COMMON SEWERS.—See *Nuisance*, 2.—*Reparation*, 1.

COMPENSATION.—See *Decree in Foro*, 2.—*Trust*, 2.

COMPOSITION-CONTRACT.

1. Held that on a bankrupt failing to pay a composition under an extrajudicial contract, the original debt revives, No. 23. p. 36.
2. A creditor under an extrajudicial composition-contract, having got an obligation from the debtor to pay his full debt, but having thereafter discharged it on payment of the composition; and having afterwards got a bill for the balance due on the full debt from the debtor, which was prescribed—Held not entitled to recover under the obligation, No. 320. p. 695.—See *Sequestration*, 9.

CURATOR BONIS.

1. Authority granted to a curator bonis to complete his ward's titles, No. 158. p. 268.
2. The appointment of a curator bonis being remedium extraordinarium, the Court will not interfere where the minor can choose his own curators, No. 310. p. 684.

DEATHBED.—See *Title to Sue, &c.* 4.

DEBITOR NON PRESUMITUR DONARE.—See *Provisions to Children*, 2.

DECLARATOR.—See *Process*, I. 8.

DECREE IN ABSENCE.

1. Held that a decree against pupils and their tutors, pronounced after appearance of the pupils and one tutor, was not to be held as a decree in absence as to another tutor who had not appeared, No. 111. p. 179.
2. Circumstances in which the Court reduced decrees of constitution and adjudication in absence, without requiring the party to pay the expenses of the decrees, No. 444. p. 905.

DECREE IN FORO.

1. Circumstances under which a plea of compensation against a charge on a decree in foro for expenses was repelled, No. 30. p. 43.
2. A party having been charged on a decree of the Court of Session, bearing to be in foro, and to have proceeded on a petition by an agent against his client under the A. S. Feb. 6. 1806, and that it had been duly served—Held competent to pass a bill of suspension on caution for the expenses of the decree merely, on the allegation that it had been served on the opposite agent, and not on the party, No. 331. p. 715.
3. A legacy having been left under an English will to the heir of conquest of the testator, who by the same will ineffectually bequeathed his landed estate in Scotland to another party; and the heir having taken up the estate, and an action having been brought

DECREE IN FORO.
against him, concluding that he should denude of the estate, or otherwise have his right to the legacy declared forfeited; and having been allowed to take the opinion of English counsel to show that his right was not forfeited; but not having done so, and having relied on information from an English solicitor that his right was forfeited; and having thereupon moved for and obtained absolviter from the conclusion for denuding, and decree against him of forfeiture of the legacy—Held not entitled to open up the decree, on the allegation that the information of the solicitor was erroneous, No. 421. p. 871.

DECREE OF CONSTITUTION.
Circumstances under which decree of constitution was pronounced, sisting execution, No. 76. p. 116.—See *Executor*, 1.

DILIGENCE, LEGAL.
1. A party having conveyed all his property in trust for behoof of his creditors, under which it was distributed among them, and having obtained decree of cessio, and executed the requisite disposition, and horning having thereafter been used against him on a debt prior to the cessio—Held,
(1.) That he was not entitled to suspend on the ground that there had been no discussion under the disposition omnium bonorum in the cessio, it not being alleged that he had acquired any funds subsequent to the date of the trust-deed; but,
(2.) That he was warranted in bringing a suspension as to personal diligence, there being nothing on the face of the charge to show that the creditor was to restrict his diligence to poinding, No. 54. p. 76.
2. A creditor having executed a caption against his debtor, without indorsing a restriction to the balance to which the debt had been reduced by partial payments since the date of the letters, and the messenger, who was likewise employed as an agent to procure a settlement of the debt, having taken his prisoner to the office of the creditor's agent, instead of directly to jail, without any application to that purpose from the prisoner, though not against his will, held that the creditor was liable in damages, No. 80. p. 123.
3. Held incompetent for a Sheriff to stop execution of letters of horning proceeding on an extracted decree in absence pronounced by him, No. 139. p. 232.
4. A charge against the drawer of a bill, proceeding on a protest recorded, not in the jurisdiction where he resides, but where the bill is payable, is irregular, No. 231. p. 412.—See *Poinding*.

DIVORCE.—See *Husband and Wife*, 2.

DONATION.
An opulent uncle having advanced money for the education and outfit of his nephew during his minority, and who was in poor circumstances, and having entered it in his books, but having died without requiring repayment, or taking any document of debt—Held that it was to be presumed that the advances had been made animo donandi, and that his trustees were not entitled, after his death, to insist on repayment, No. 130. p. 219.—See *Provisions to Children*, 2.

ENTAIL.

1. Bill of suspension passed as to the questions,

(1.) Whether an heir of entail, succeeding in virtue of the forfeiture of a prior heir, is entitled to an entry as an heir, or as a singular successor; and,

(2.) Whether, where the entail has been recognised by a former superior, to whom the present one has succeeded as an heir of entail, the latter can be affected by that acknowledgment, No. 20. p. 30.

2. A party having succeeded to an estate by virtue of an entail prohibiting sales, but against which there was no irritant nor resolutive clause—Held,

(1.) That he was entitled to sell the estate; but,

(2.) That he was bound to reinvest the price in lands, and to take the titles under the terms of the entail, No. 237. p. 418.

3. An heir of entail in possession having granted a lease, binding himself and his heirs to pay for meliorations—Held that an action for payment of them lay against his representatives, and not against a succeeding heir of entail, No. 336. p. 722.

4. Bill passed to try the question, whether an heir in possession of an estate under an entail was entitled to cut wood necessary to the comfort and amenity of the mansion-house, No. 387. p. 811.

5. Held,

(1.) That an heir of entail prohibited from selling, but having power to do so in consequence of a defect in the resolutive clause, and who sold the estate, was bound to reinvest a sum equivalent to the price in lands to be entailed in terms of the original entail.

(2.) That a judgment in a question tried with the heirs of entail, as to the validity of a disposition to a purchaser, was not a res judicata as to the heir's obligation to reinvest; and,

(3.) That a substitute heir was not barred from insisting on the fulfilment of that obligation by a delay of nearly 30 years from the date of the sale, No. 396. p. 882.

6. A party having, for the purpose of creating a freehold qualification, granted a feu-right of certain lands on which the disponee was infeft, and having also disponed the superiority; and having thereafter executed an entail of his estates, including the lands in question, which was duly recorded, and, after his death, the disponee having executed a disposition of the lands in favour of the heirs called in the entail, and under the same conditions, &c. as were contained in the entail, setting forth that he (the disponee) held the lands merely in trust; but this disposition not having been recorded—Held, that as the deed executed by the disponee had not been recorded, it could not prevent a creditor from proceeding with diligence; and question raised, but not decided, Which of the two deeds was the original entail, the recording whereof was necessary to secure the estate against creditors? No. 465. p. 937.—See *Prescription*, 1. 6.

EXECUTOR.

Held that a debtor of a party deceased is warranted to pay to his executor nominate, although unconfirmed; and that a knowledge of a certain sum being set apart by the deceased as a provision

for his wife and children does not put the debtor in malâ fide to transfer a sum to the account of the executor of similar amount at the credit of the deceased,—the particular sum in question not having been appropriated by the deceased to that purpose, No. 369. p. 785.—See *Foreigner—Title to Sue, &c.* 2.—*Passive Title*, 2.

EXPENSES.

1. (1.) The expenses of two Jury trials having been awarded, held that the expense of examining on commission a witness, whose deposition was afterwards read to the Jury,—of preparing issues in this Court,—of the discussion in this Court in obtaining a new trial,—and of opposing a bill of exceptions, fell under the award.
(2.) Interest allowed on expenses, No. 266. p. 524.

2. In a case relative to an urban tenement, the defender having been found entitled to expenses, and the auditor having reserved the question whether he had right to the expense of a lithographic plan of the premises, which he had made without the order of Court, found, that although it had been extremely useful, the expense of it could not be laid on the opposite party, Note, p. 659.

3. Trustee for a bankrupt litigant not entitled, in sisting himself as party to the process, to insert a qualification that he shall not be liable for the expenses, No. 382. p. 805.—See *Agent and Client*, 1. 4.—*Attorney's License—Bankrupt*, 1.—*Cessio*, 1.—*Justice, Administration of*, 1.—*Mandatory*, 3.—*Poor's Roll—Process*, I. 7. III. 1. V. 4. 7. VI. 8. VIII. 3. IX. 1. 2. 4.—*Sequestration*, 3. —*Sheriff-Clerk's Fees—Stat. 6. Geo. IV. c.* 120.—*Trust*, 3.

——— PREVIOUS.

A party having obtained a bill of suspension to be passed, and having expede letters thereon, but having allowed judgment finding the letters orderly proceeded to go out by default, must, on presenting a new bill, pay the expenses previously incurred, No. 27. p. 41.—See *Decree in Absence*, 2.—*Decree in Foro*, 2.—*Poor's Roll—Process*, VI. 9. IX. 3.

FACTOR LOCO TUTORIS.

1. (1.) That a judicial factor loco tutoris under the Act of Sederunt, Feb. 13. 1730, is liable in interest upon interest on sums which he has neglected to recover in terms thereof; and,
(2.) That, by neglecting to comply with the rules of the A. S., he is not entitled to any commission, No. 46. p. 62.

2. A complaint having been made against a party as factor loco tutoris, and he having alleged in defence that he was a protutor, and that therefore the complaint was irregular, the Court, being satisfied that such was not the fact, repelled the defence, No. 107. p. 173.

3. Circumstances in which an interim factor loco tutoris was appointed to act during the currency of the usual intimation on the walls, No. 286. p. 564.

FACULTY.

Circumstances under which it was held that a power of dividing a sum bequeathed by a deed of settlement had not been validly executed, and that in terms thereof it belonged to the legatees equally, No. 66. p. 101.—See *Landlord and Tenant*, 4.

FEE AND LIFERENT.

Circumstances in which a parent was found to be a liferenter, and the children fiars, No. 390. p. 814.

FEE, OR SPES SUCCESSIONIS.

Lands having been conveyed to J. T. and three others, inter alia, for the purpose of dividing them into a certain number of shares, and the truster having declared, 'that I hereby appoint that 4½ of 'these shares shall be held by the said J. T. in liferent, during 'all the days and years of his lifetime, and at his decease the fee 'and property thereof shall be divided among the children law-'fully procreated of his body as follows;' and having then specified certain proportions, and instructed the survivors or survivor of the disponees to see that they should be so divided; and the deed being granted under these conditions—Held that J. T. was merely a liferenter, and that his children were fiars, No. 364. p. 779.

FEUDAL TITLE.—See *Freehold Qualification*, 3.—*Heritable Security —Proof*, V. 2.—*Salmon Fishing*, 2.

FOREIGN.

A native of Scotland, who was domiciled in India, but part of whose property was vested in heritable bonds in Scotland, having executed a will in India, which was not effectual to carry the heritable bonds; and a question having arisen, whether his heir at law, who claimed the heritable bonds as heir, was also entitled to claim a share of moveables under the will—Held that the construction of the will, as to whether it expressed an intention to carry the Scotch heritage, and the legal consequence of that construction, must be determined by the law of England, No. 57. p. 78. —See *Bill of Exchange*, 3.—*Jurisdiction*, 2.—*Marriage*, 1.

FOREIGNER.

Circumstances under which it was held that cautioners for executors confirmed in a Scottish Court, but who resided in England, could not be called on to count and reckon in terms of their bond, till a decree was obtained against the executors, No. 424. p. 879.—See *Jurisdiction*, 1.

FORGERY.

1. A bill of suspension passed simpliciter of a charge on a bill, which the Court was satisfied from inspection was forged, No. 29. p. 43.
2. Bill of suspension passed simpliciter of a charge on a bill appearing, comparatione literarum, to be forged, No. 261. p. 517.—See *Bill of Exchange*, 2.—*Process*, VI. 3.

FREEHOLD QUALIFICATION.

1. An objection may be pleaded in Court, though not recorded in the Freeholders' minutes, No. 93. p. 150.
2. A claim for enrolment as a freeholder having been rejected on the ground of nominal and fictitious, the Court, after ordering and advising written interrogatories and answers subscribed by the claimant, repelled the objection, No. 103. p. 168.
3. Held,

(1.) That although a disposition containing procuratory and precept, on which sasine is taken, be confirmed by a charter of confirmation and resignation, yet it is still competent to take sasine

FREEHOLD QUALIFICATION.
on the precept in that charter, so as to make up titles by resignation;
(2.) That a party who is both disponee and heir of line of a disponer is entitled to be enrolled a freeholder, as heir apparent of the disponer; but,
(3.) That part of the lands claimed on, as affording a freehold qualification, having been omitted in recording the sasine founded on, the claim is ineffectual, No. 228. p. 383.
4. Freeholders having sustained a claim of restriction made by a freeholder, and allowed him to retain his place on the roll—Held that a petition and complaint against this resolution, merely praying to find that they 'did wrong in allowing the qualification to 'be restricted,' without any prayer to have the party struck off the roll, was incompetent, No. 269. p. 531.—See *Sasine*, 1. 2.
FREIGHT.—Held,
(1.) That a ship-owner, by a voluntary landing of goods, to be placed in a private bonded warehouse, under the Warehousing Acts, loses his lien for payment of freight; and,
(2.) That a delivery 'in docks,' in the meaning of the 4th Geo. IV. c. 24, § 83, which reserves the lien for freight, does not extend to docks of the description of those belonging to the Magistrates of Edinburgh at the port of Leith, No. 297. p. 660.
GAME DEBT.
Bill of suspension passed to try question, whether the onerous holder of a bill of exchange is affectable by the circumstance of its having been granted in consideration of a game debt, No. 26. p. 40.
GLEBE.—See *Prescription*, 3.
HARBOUR DUES.—Held,
(1.) That steam-boats carrying passengers merely with their luggage fall within the description of 'passage-boats,' and are liable to pay rate only as such.
(2.) That they are liable in payment of rates, in consequence of landing their passengers by means of a boat, or at a pier erected by the owners within the limits of the port, although not having the benefit of the artificial piers belonging thereto, No. 298. p. 665. and see also No. 299. p. 668.
HERITABLE CREDITOR.
1. An heritable creditor in a cognition and sale, having purchased the house over which his security extended, and paid up the arrears of feu-duties, allowed bank interest thereon, No. 101. p. 163.
2. An heritable creditor having entered into complete and sole possession of the subjects over which his security extended, and having charged a factor's fee, held liable in a factor's diligence, and accountable as such, although the heritable bond declared that he should not be bound to do diligence against tenants, and should only be accountable for actual intromissions, No. 212. p. 353.
3. Circumstances in which heritable creditors were held not entitled to proceed with a sale of the property under their bond, while they refused to accept payment on granting an assignation to a third party, No. 324. p. 701.
——— BURDEN.—See *Sale*, 1.
——— SECURITY.

HERITABLE SECURITY.

(1.) An heritable bond with a double holding, and infeftment following, preferred to a prior bond with a public holding, the infeftment on which was unconfirmed; and,

(2.) An heritable bond granted in security of two bills specifically narrated, not vacated in consequence of these individual bills having been retired by subsequent renewals, the debt remaining undischarged, No. 223. p. 372.

HOMOLOGATION.

Circumstances under which a plea of homologation was repelled, No. 440. p. 900.—See *Arbitration*, 4.

HUSBAND AND WIFE.

1. Bill of suspension passed simpliciter of a charge by a married woman, without the concurrence of her husband, and for payment of a sum of money, as to which it was alleged that his jus mariti was excluded, No. 146. p. 242.

2. A party having married the heiress presumptive of an estate, the entail of which excluded the jus mariti, and having in his contract of marriage settled certain additional provisions on the children of the marriage, payable in the event of the succession of her or the heir of the marriage to this estate, in which event also an additional tocher stipulated to him was not to be exigible, and having divorced her on the head of adultery, after which the succession to this estate opened to her—Held,

(1.) That he had no claim to the rents and administration of the estate, either by law, or by virtue of the contract of marriage.

(2.) That his claim was not made better by his having raised an action in name of one of his children, a substitute heir of entail, to set aside the deed excluding the jus mariti, as in contravention of a prior entail, which, however, contained an exclusion of the courtesy.

(3.) That he was not entitled to relief of the additional provisions to his children.

(4.) That he was not entitled to demand the additional tocher.

(5.) That no claim of damages lay against his divorced wife; and,

(6.) That it was incompetent for him to conclude against her for aliment to the children of the marriage, who, with the exception of one, had attained majority, No. 148. p. 243.

3. Held that a contract of separation and provision, whereby a husband bound himself to pay to his wife, during her life and separation, an annuity of £30, in consideration of which she renounced all legal claims against him, was not effectual to bar her from claiming her legal provisions on his death,—the amount not being fair, onerous, and adequate in the circumstances of the husband, No. 157. p. 266.

4. A charge having been given to a married woman on a bill accepted by her, and the charger having judicially abandoned the charge against her, and passed from it by a marking on the letters of horning, a bill of suspension refused, No. 198. p. 333.

5. Held that a woman who has enjoyed the status of a wife, during the life of a person who she alleged was her husband, is entitled

HUSBAND AND WIFE.
after his death to an aliment hoc statu from his representatives, No. 209. p. 344.
6. Held that a husband having intimated to an innkeeper that he would not be responsible for any articles furnished to his wife after a certain date, was not liable thereafter for any thing further than what was necessary for her maintenance according to his rank and fortune, No. 238. p. 464.
7. A bill of suspension passed simpliciter of a charge given by a married woman without the concurrence of her husband, No. 280. p. 549.
8. A married woman, whose husband resided abroad, having drawn and indorsed a bill which was accepted by the party drawn on, and the indorsee having brought an action against both the drawer and her husband, (neither of whom appeared,) and against the acceptor—Held that the indorsee was entitled to pursue the acceptor; and that, as decree passed in absence against the drawer and her husband, the acceptor was bound to pay, No. 307. p. 679.
9. Circumstances under which a lease by a husband to his nephew and an heir-portioner was set aside, as in fraudem of an unrecorded liferent infeftment granted to his wife intuitu matrimonii, No. 443. p. 903.

HYPOTHEC, LANDLORD'S.—See *Sale*, 4.—*Sequestration*, 2.

IMPLIED OBLIGATION.
A father having conveyed his estate to his son by a mortis causâ disposition, subject to his debts, and a provision to his daughter, for the payment of which the son was to be personally bound by acceptance thereof; and he having accepted and entered to possession, and intromitted with his father's effects—Held that the son did not make himself liable to any greater extent than to count and reckon with the daughter for his intromissions, No. 78. p. 119.

——— WARRANDICE.—See *Warrandice*, 2.

INHIBITION.
Court refused to recall, without caution, inhibition used against the proprietor of an entailed estate, on the dependence of an action containing alternative conclusions of declarator of marriage, or of damages for seduction, No. 277. p. 544.—See *Process*, I. 7.

INSURANCE.
1. Circumstances in which a shipping place not protected by any artificial works, was held to be a 'port' within the meaning of a policy of insurance, No. 268. p. 525.
2. An insurance having been effected on a vessel, and thereafter renewed by a renewal receipt bearing reference to a policy by a special number; but no policy having been delivered, contrary to the usage of insurance offices in the place to send the policies to the insured—Held, in an action for delivery of a policy in the terms alleged by the insured to have been those agreed on, and for recovery of loss, that it was competent to prove the nature of the risk insured contrary to the terms of the policy, by parole and circumstantial evidence; and that, in an action against a foreign insurance company and their agent in this country, the pursuers were entitled to a verdict generally against both the company and their agent, no evidence having been led by them, in a trial before a Jury, of the agent having exceeded his powers, No. 462. p. 930.

INTERDICT.

Interdict granted to prevent the trustee on a sequestrated estate using a procuratory of resignation vested in the bankrupt, who had previously granted to a creditor an heritable bond containing the usual assignation to the writs and titles, and in virtue of which procuratory the trustee was attempting to pass a signature and charter in Exchequer to cut out the heritable creditor, No. 165. p. 277.—See *Church Seat—Road Acts*, 4.—*Salmon Fishing*, 1.

INTERDICTION.

1. Held that a sale of a property by an interdicted party to one of his interdictors, for an onerous and rational cause, is effectual, No. 82. p. 128.
2. Circumstances under which it was held that a lease granted by a liferenter under interdiction in security of a debt, in favour of one of his interdictors, and which was consented to by the other interdictors, was liable to be reduced, No. 174. p. 301.

INTEREST.

1. In an accounting between an agent and his employer, the Court allowed the balances to be struck annually, so as to charge compound interest, and also the interest of an heritable debt retained in security of certain obligations of warrandice to be annually accumulated in the same way, No. 112. p. 180.
2. Circumstances in which a party who had purchased an estate burdened with an heritable security, but which was subsequently set aside, was held liable only in four per cent. interest on the part of the price corresponding to the amount of the debt till set aside, and thereafter in five per cent., No. 345. p. 788.—See *Factor loco Tutoris*, 1.—*Heritable Creditor*, 1.—*Sale*, 6.

INTEREST ON EXPENSES.—See *Expenses, Interest on.*

INTRINSIC OR EXTRINSIC.—See *Proof*, I. III. 1.

JOINT OBLIGATION.

Circumstances in which a joint obligation to be at the expense of carrying on certain actions for mutual behoof, was held to be limited to the expense of the actions while conducted by an agent specially appointed in the agreement, and not to extend to the expense incurred in the actions after the renunciation of that agent, and the appointment of another, No. 377. p. 797.—See *Relief.*

JUDICIAL EXAMINATION.

Court refused to allow the holder of a bill to be judicially examined as to his not being a bonâ fide onerous indorsee, and as to his knowledge of the manner in which it had been obtained from the acceptor, a minor of facile disposition, on the ground that there was not sufficient cause of suspicion against him, and that a proof had been taken, on which a judgment of the Inner House had been pronounced in his favour, before the examination was craved, No. 42. p. 54.

——— FACTOR.—See *Factor loco Tutoris.*

——— INSPECTOR.

A professional person employed in a cause by order of the Court to make an inspection, entitled to decree for his account against both the parties, conjunctly and severally, No. 258. p. 514.

——— REMIT.—See *Proof*, X.

JURATORY CAUTION.

1. Juratory caution in a bill of suspension not received without production of title-deeds of suspender's heritable property, which were in possession of his agent, subject to a right of hypothec, No. 185. p. 314.
2. The agent for a bank having been charged under his bond for a balance appearing on a stated account, and a bill of suspension of that charge having been passed on juratory caution, the Court also passed on juratory caution a charge on one of the bills which formed an item in that stated account, No. 389. p. 813.

JURISDICTION.

1. Held,

(1.) That an agent employed by a trustee on a sequestrated estate to conduct a process for behoof of the estate, cannot proceed in a Court in this country against a foreigner who has claimed on the estate for payment of his business account of expenses, without first establishing a jurisdiction by arrestment jurisdictionis fundandæ causâ; and,

(2.) That it is competent to an arrestee to plead in a forthcoming that the decree of constitution obtained by the pursuer against the foreigner was obtained without so establishing a jurisdiction, No. 6. p. 8.

2. Held competent for the Magistrates of a royal burgh to act as Judges in a question between their own tacksman of burgh dues, and a burgess, relative to the payment of these dues, No. 8. p. 14.
3. Held that an arrestment jurisdictionis fundandæ causâ is effectual to constitute a jurisdiction against a native Scotchman domiciled abroad, in an action at the instance of a Scotchman also residing abroad, and where the transactions on which the action was founded arose beyond the territory of the Court, No. 81. p. 127.
4. Circumstances under which it was held, that a petition to a Commissary to cause certain effects, alleged to have belonged to a defunct, to be delivered to her representatives, or to inventory and preserve them, was incompetent, No. 126. p. 206.
5. An action in the Court of Session having been compromised, in consequence of the defender agreeing to pay expenses and a composition—Held competent to raise an action on the agreement before an Inferior Court, No. 240. p. 467.
6. The Court will not interfere with the exercise of the discretionary powers vested in Commissioners of Police under a local police act, except in case of excess of power, or deviation from the statute, No. 320. p. 711.
7. Two debts, each under £25, having been assigned to one person, without value, for the purpose of rendering it competent to bring the action in the Court of Session—Held that this was an evasion of the statute 50th Geo. III. c. 112, and that the action was incompetent, No. 368. p. 784.
8. Part of the cargo of a vessel having been sold by warrant of the Judge Admiral, pending the discussion of a process for condemnation as a prize, and the proceeds lodged in a bank on a promissory note deposited with the Clerk of Court; and the Judge Admiral having found that the cargo was not liable to condemnation, and

JURISDICTION.

that it must be restored to a certain foreign house or their attornies; but no claim having been made for many years, and a summons of multiplepoinding having been raised in the Court of Session in name of the bankers, by a party pretending right to the fund, in which there was a conclusion that the Admiralty Clerks should be ordained to produce the promissory note, but which summons was not executed against them—Held,

(1.) That it ought to have been so executed.

(2.) That it was an incompetent process in the Court of Session; and,

(3.) That the Admiralty Clerks were entitled to object to the competency, No. 429. p. 886.

9. Held that it is incompetent for a Sheriff, in a process of commutation of thirlage, to entertain a question as to the existence of a right of thirlage over certain lands, where it is not constituted by written title over these lands per expressum, or established by decree of the Supreme Court, No. 447. p. 911.—See *Diligence, Legal*, 3. 4.—*Interdict—Poor*, 3.

JURY COURT.—See *Process*, IV.

JUSTICE, ADMINISTRATION OF.

1. A Justice of Peace Depute-clerk for one of the districts of a county, who was also clerk to the road trustees of the same district, having in the latter capacity raised in his own name an action before the Justices of the Peace of his own district against two parties, accusing them of evasion of toll, and concluding for penalties, part of which was payable to himself; and having conducted the proceedings by his own clerk, who also officiated as clerk of Court, he himself not having attended personally, and one of the parties only having been cited, and decree pronounced against him—Held, in a petition and complaint presented by both of these parties, without the concourse of the public prosecutor,

(1.) That the party not cited had no title to pursue, but that the other had.

(2.) That the clerk had been guilty of malversation in office, and therefore suspended for one year, and found liable in expenses; but,

(3.) That these expenses were not to be taxed as between agent and client, No. 273. p. 537.

2. Held to be an interference with the administration of justice to publish a report of a statement made at a public meeting of road trustees by their agent, relative to a case depending in Court against them, No. 91. p. 147.

JUSTICE, COLLEGE OF.

Held incompetent for a party claiming right as a member of the College of Justice to raise an action for a sum under £25, as indorsee of an open account due to a party not having any privilege, and to whose trustee he was to be accountable, No. 191. p. 321.

LANDLORD AND TENANT.

1. Circumstances under which it was held that a tenant, having followed the course of cultivation pointed out in his lease, was not liable in damages for an alleged deterioration of the lands, arising

LANDLORD AND TENANT.
from the rules of good husbandry not having been observed, No. 32. p. 45.
2. Held that a waygoing tenant, bound by his lease sufficiently to manure his lands, and consume on them all the fodder except that of the last crop, was entitled to the value of dung left on the farm, though made prior to the preceding bear seed-time, when, in relation to the nature and situation of the farm, it was inconsistent with good husbandry, and had been his practice, during the preceding years of the lease, to preserve the dung to be consumed on wheat crops in autumn, No. 129. p. 212.
3. Circumstances in which a party who had taken a piece of waste ground for one or two years, was entitled, at his removal, to the materials of certain erections made by him thereon, No. 136. p. 227.
4. A tenant under a lease for 38 years, and thereafter during the lifetime 'of any person to be condescended upon by him by a 'writing under his hand,' held to have validly exercised the power in favour of his eldest daughter by a nomination in these terms:—'I do hereby nominate and appoint the heir-male procreated of 'my body, and existing at the expiration of the said 38 years; 'whom failing, I do nominate and appoint my eldest daughter 'then in life,' No. 272. p. 534.
5. Bill of suspension by a tenant of a charge by an assignee of the landlord for payment of rent, refused to be passed without caution, notwithstanding the tenant having raised a multiplepoinding as to the rent, in respect that he intended to resist any application for an order to consign in the multiplepoinding, on the ground of his having certain claims of retention and compensation against his landlord, No. 282. p. 557.
6. The subrent payable to the principal tenant of a farm is not conclusive evidence of the value against the tenant in a question of violent profits, No. 304. p. 676.
7. Held that an action of removing, founded on the irritancy of the A. S. Dec. 14. 1756, as to being in arrear of two years rent, is competent against a tenant possessing under a verbal lease from year to year, No. 384. p. 807.
8. A tack having been granted to the tenant, 'his heirs, assignees, 'and subtenants,' with warrandice to him and 'his foresaids;' and the tenant having subset the farm with absolute warrandice, but without any assignation to the warrandice in the principal lease—Held, on the principal lease having been reduced, as ultra vires of the landlord, that the subtenant was entitled to bring an action of damages against the landlord under the warrandice, No. 464. p. 935.—See *Adjudication*, 2.—*Cautioner*, 5. 6.—*Entail*, 3.—*Sale*, 4.—*Sequestration*, 2.

LEGACY.
1. Held that a legatee is entitled to decree constituting his legacy against the executors or trustees of the testator, although it be provided by the will that, in the event of an insufficiency of funds, the legacies shall suffer a pro rata diminution, and it has not been ascertained whether there will be sufficient funds, No. 39. p. 50.

LEGACY.
2. Circumstances under which it was held that two legacies of the same amount, in separate deeds, in favour of the same party, were both due, No. 173. p. 297.
3. A party resident in a Danish West India island, having bequeathed an annuity to one of his executors in Scotland during his administration; and the executor having appointed an attorney to act for him, which he did—Held, that although it was alleged that by the law of that island no one who was not on the spot could act as executor, yet that the annuity was due, No. 392. p. 817.

LEGITIMATION PER SUBSEQUENS MATRIMONIUM.—See *Marriage*, 1.

LIS ALIBI PENDENS.
An action having been raised and carried on in an Inferior Court, and thereafter an action of the same nature having been brought before the Court of Session, and the former advocated ob contingentiam, a defence of lis alibi sustained, No. 397. p. 825.

LITERARY PROPERTY.
A bookseller having agreed with an author for an edition of a history to be written by the latter in four volumes, and having obtained subscriptions for all that could fall within his edition—Held not entitled to prevent the author from publishing a continuation of the history, which embraced part of the period, and also some of the matter contained in the last of the four volumes, No. 334. p. 719.

MANDATE.
Circumstances in which the owner of a small vessel held not liable for furnishings made on the orders of two men employed to navigate her, contrary to his instructions, No. 378. p. 801.—See *Burgh Royal*, 1.—*Process*, I. 3.

MANDATORY.
1. Held that a factor or mandatory is entitled to act until he receives authentic information of the death of his constituent, No. 58. p. 86.
2. Held that the mandatory of a defender residing abroad is liable for expenses, No. 183. p. 310.
3. Held that a mandatory in a process can only be liberated from his liability for subsequent expenses by entering a minute on the record, withdrawing from acting as such, No. 365. p. 783.—See *Burgh Royal*, 2.

MANSE.
1. Circumstances in which the minister of a royal burgh, with a considerable extent of landward parish, was found entitled to a manse;—and Observed, that he would have been so entitled under the act 1663, independently of special circumstances, No. 278. p. 546.
2. Held,
(1.) That it is competent for a presbytery to order additions to be built to an old manse, so as to render it suitable for the minister; and,
(2.) That the heritors are bound to be at the expense of making the manse free from damp, No. 449. p. 913.

MANUFACTURERS.—See *Stat.* 12. *Geo. I. c.* 12.

MARRIAGE.

1. A Scotchman by birth, who inherited a landed property, and succeeded to an entailed estate in Scotland, but who settled in England in early life, making occasional visits to Scotland for business and amusement, having, after about forty years residence in England, had a son by an illicit connexion with an Englishwoman, and having come four years thereafter to Scotland, accompanied by the child and the mother, where, after a residence of fifteen days, he was married to her; and having remained in Scotland for about two months, and then returned to England with his wife and child, where they resided till his death—Held, in a declarator of bastardy brought at the instance of the next heir to the entailed estate, that the son was legitimated by the marriage of his parents, No. 294. p. 605.

2. (1.) Circumstances sufficient to constitute an irregular marriage. (2.) Held irrelevant as a defence against a declarator of marriage, adherence, and aliment, to allege that the woman had, previously to her marriage with the defender, had carnal connexion with his full brother, and had concealed that circumstance from the defender, No. 333. p. 716.—See *Parent and Child*, 2.

——— CONTRACT.

A party having bound himself by his contract of marriage to provide and secure to the heir of the marriage the whole estates belonging to him at the time of his death; and having granted a trust-deed for payment of debts, and creating a sinking fund, and for other purposes—Held that the deed was ineffectual against the heir, except in relation to the payment of debts, No. 399. p. 826.

MASTER AND SERVANT.

A written contract of service, not stamped nor tested, having been entered into by a minor with a party trading under the firm of a company in which there had been originally several partners, but of which he was now the sole partner, held that the contract was binding, No. 203. p. 335.—See *Apprentice—Reparation—Stat.* 12. *Geo. I. c.* 12.

MEDITATIONE FUGÆ WARRANT.

Held not a sufficient ground for liberating a party incarcerated on a meditatione fugæ warrant, till he should find caution judicio sisti in any action to be brought against him within six months, that the creditor had delayed to do so for four months; but having alleged that he was merely going out of the country on a periodical journey in the course of his business, a reservation made to him to apply to the Judge incarcerator for a re-examination and investigation as to that matter, No. 169. p. 291.

MESSENGER.—See *Cautioner*, 9.

MULTIPLEPOINDING.—See *Jurisdiction*, 8.—*Process*, V.

MUTUAL CONTRACT.

A party who had entered into a contract with the proprietor of a steam-engine for a supply of power, but had fallen into arrear of the stipulated remuneration, and become insolvent, having given a charge to compel a continuance of the supply of power which had been withheld by the proprietor of the engine; the Court, after allowing him time to find caution, which he failed to do,

passed a bill of suspension by the proprietor simpliciter, No. 156. p. 264.

NAUTÆ CAUPONES STABULARII.

The mate of a ship belonging to the Clyde having given up his situation at London, after the vessel's arrival there from her foreign port, leaving his chest in the vessel to be conveyed round to the Clyde with the vessel; and the master having thereafter sent the chest on shore, in consequence, as he alleged, of some smuggled goods having been found in it, and having given it in charge to a tavern-keeper there without notice to the owner—Held,

(1.) That he was responsible for it to the owner, who was not obliged to accept an order on the person with whom it was deposited; and,

(2.) That the owner's oath in litem, as to the value, was to be taken in preference to the opinion of other individuals who had seen the contents after the master had sent the chest on shore, No. 300. p. 669.

NOBILE OFFICIUM.

Court declined to appoint a factor to execute the purposes of a trust, in room of a trustee who had become insolvent, on the application of the truster alone; but did so on the concurrence of a party beneficially interested under the trust having been obtained, No. 170. p. 293.

NON-ENTRY.

Circumstances under which an action of non-entry was dismissed, No. 134. p. 223.

NUISANCE.

1. A verdict having been found for a pursuer in an action for abating a nuisance, decree pronounced in terms of the libel, No. 260. p. 517.
2. Circumstances under which it was held that a party was not entitled to introduce the contents of a common sewer into a mill-lead, No. 448. p. 912.

OATH IN LITEM.—See *Nautæ Caupones Stabularii*, (2.)

OATH, REFERENCE TO.—See *Proof*, III.

OATH IN SUPPLEMENT.—See *Proof*, IV.

PARENT AND CHILD.

1. Held that a mother whose husband was dead, and who had married again, was entitled to access to her minor daughter by her first marriage in the custody of her curator; but that, in the peculiar circumstances of the case, this could only be allowed in presence of a third party, No. 207. p. 341.
2. Bill of suspension passed simpliciter to try the question, whether, in the circumstances, the presumption of pater est quem nuptiæ demonstrant was redargued, No. 382. p. 715.

PARISH.—See *Schoolmaster*.

PARTNERSHIP.

1. No objection to a decree in an action against a company, that it was pronounced after the sequestration of the company, and the death of the sole partner, without being transferred against the creditors or representatives, notice having been given to the former, who declined to appear, No. 89. p. 140.
2. It having been stipulated by the original contract of a partner-

PARTNERSHIP.
ship, that the books should be balanced annually on the 15th of May, and that the representatives of a deceasing partner should be settled with by a medium struck between the annual balance prior to his death and the period of it; and the company having, by a subsequent resolution, declared that the balance should be struck annually on the 30th of April, and the balances having been made accordingly—Held that the balances so struck could not be altered, but must be considered as correct, and conclusive against all concerned, No. 138. p. 221.

3. The manager and partner of a private banking company having acquired a disposition and assignation to an heritable right as manager; and having, after the dissolution of the company, claimed in virtue thereof in a ranking and sale; and having been opposed by the granter of the deed on the ground of its having been obtained usuriously and by fraud; and the granter having raised an action of reduction in support of the objections to the claim, and having directed it against him as manager of the company, and not having called the partners—Held that the summons was irregular,—that he could not be sued as such,—and that process must be sisted till the other partners were called, No. 234. p. 414.

4. Held that where a debt is not constituted against a company, all the partners must be called in an action for constituting it against the partners, No. 351. p. 747.—See *Assignation—Cautioner*, 4. —*Master and Servant.*

PASSIVE TITLE.

1. Held that intromission by a tutor before making up inventories, but which were afterwards made up, did not subject him personally in payment of debts affecting the estate, No. 111. p. 179.

2. A widow who had been decerned executrix qua relict, but had intromitted with her husband's effects, &c. without confirmation or making up inventories, subjected to the passive title of vitious intromission, No. 187. p. 315.

PAWNBROKERS' ACT.

The Court passed a bill of suspension and interdict, presented by the trustee on a bankrupt estate, against the sale of goods impledged with a pawnbroker by the bankrupt with the view of defrauding his creditors,—the money lent on them having been advanced, although on tickets of £10 each, in sums to a much larger amount on single pledges, No. 117. p. 192.

PENALTY.—See *Apprentice.*

POINDING.

An arresting creditor having raised a summons of forthcoming, concluding for decree against the arrestee, to which the common debtor was called; and decree having been pronounced against the arrestee and the common debtor for his interest; and horning having been raised thereon, and a poinding executed of goods in the possession of the common debtor, which were afterwards sold to a third party; and decree for their value having been obtained by the poinder against that party, who brought a suspension, on the ground that the poinding was inept, in respect it was not competent to poind the goods on a mere decree of forthcoming against the common debtor

for his interest; the Court, in the special circumstances, repelled the objection, No. 247. p. 473.

POLICE.—See *Jurisdiction*, 6.

POOR.

1. A merchant burgess, partner of a company carrying on business in a counting-house within burgh, at which he gives his personal attendance daily for the greater part of the year, but having his dwelling-house with his family in a neighbouring parish, where he is assessed as a householder for the support of the poor—Held to be an inhabitant of the burgh, to the effect of being liable in his proportion of the assessment for the poor, No. 230. p. 390.
2. A pauper having been tried for certain acts of theft before the Court of Justiciary on the indictment of the Crown, and a verdict having been returned finding him guilty, but that he was subject to fits of insanity at the time of committing the acts charged, on which verdict the Court ordained him to be confined in the jail of the head burgh of the county where the crime was committed—Held that the burden of maintaining him in jail, and afterwards in a lunatic asylum, till liberated on a remission, must be borne by the Crown, and not by the county where the acts were perpetrated, nor the burgh of imprisonment, nor the parish of his settlement, No. 359. p. 767.
3. The heritors and kirk-session of a parish not having taken a claim for relief into consideration, or given any deliverance thereon—Held,

(1.) That the Sheriff has jurisdiction to ordain them to meet and consider whether the claimant is entitled to aliment, and that he is entitled to allow a proof of the settlement of the pauper, in order to enable him to determine whether he will so order them to meet.

(2.) That a meeting pending the discussion before the Sheriff, at which the heritors and kirk-session approved of the conduct of the minister in verbally refusing relief, and resisting the pauper's application to the Sheriff, will not alter the case.

(3.) Question raised, but not decided, whether an action by a third party, who had alimented a pauper, against the parish, is competent before the Sheriff, No. 456. p. 921.—See *Process*, I. 6.

POOR'S ROLL.

A party on the poor's roll cannot be obliged to find caution for expenses; but Observed, that it is not incompetent to oblige him to make payment of expenses previously awarded, before allowing him to proceed with his action, No. 343. p. 727.

POSSESSORY JUDGMENT.

1. Circumstances under which a party was found not entitled to a possessory judgment as to right of salmon-fishing, No. 144. p. 238.
2. Circumstances under which a personal title, with seven years possession, was held sufficient to warrant a possessory judgment, No. 329. p. 714.

PRESCRIPTION—I. LONG,

1. Held,

(1.) That a party having possessed an estate on a title from the Crown for upwards of forty years, had acquired a prescriptive right, although his title bore that the Crown had right by virtue of the act of annexation, in which there is an express exception of the right of the Crown to such lands; and,

PRESCRIPTION—I. LONG.

(2.) That, in computing the period of forty years, the minority of an heir-substitute of entail is not to be deducted, No. 44. p. 57.

2. (1.) A vassal being taken bound by a feu-contract to relieve the superior of the public burdens, under a qualification that the superior was to pay one fourth part thereof, but which qualification was omitted in the charter granted 20 days thereafter, and the whole burdens having been paid by the vassals for nearly two centuries—Held that they were not entitled to be relieved by the superior of one fourth of the burdens.

(2.) Feu-duties in kind having, during that period, been paid by a different measure from that stipulated in the charter—Held that the superior was defended by bona fides against a claim for repetition of the excess, No. 167. p. 284.

3. The possession by a proprietor of a barony for upwards of 40 years of a piece of ground, formerly the grass glebe of the minister of the parish, but situated in the centre of the barony, under an agreement by the presbytery to grant a feu, but without any feu having been granted—Held not sufficient to establish a prescriptive right thereto, No. 220. p. 367.

4. A proprietor of lands having feued them, and infeftment having been taken; and having thereafter granted to the feuar a disposition of the lands with two manners of holding; and titles having been made up, and the lands possessed thereon for more than 40 years, without reference to the feu-contract—Held that although the property and superiority had been thus separated, yet a good prescriptive title to both had been acquired, No. 243. p. 469.

5. The Court repelled a plea of prescription founded on an infeftment on an adjudication, followed by upwards of 40 years possession, as against a reduction of a decree of expiry of the legal obtained only nine years before the action was brought, No. 319. p. 694.

6. Circumstances in which a debt incurred by an heir of entail, prior to recording the entail, was kept up against a succeeding heir, notwithstanding the lapse of 66 years, No. 372. p. 790.

——— II. TRIENNIAL.

1. Held that neither the triennial nor the quinquennial prescription is applicable to a consignment of goods made in security of an advance of money, and with power to sell in the event of the money not being repaid within a specific period, No. 125. p. 205.

2. Held that the triennial prescription does not apply to the price of a bullock alleged to have been purchased for family consumption, No. 204. p. 338.

3. Held that the production, in an action by a defender, of an account for goods furnished within three years from its date, as a counter claim against the pursuer, interrupted prescription, No. 349. p. 742.

4. Held,

(1.) That cash advances made by a law agent do not fall under the triennial prescription; but,

(2.) That his proper business account does, No. 379. p. 802.

——— III. QUINQUENNIAL.

Circumstances under which a plea founded on the quinquennial prescription was repelled, No. 15. p. 28.—See *supra*, II. 1.

PRESCRIPTION—IV. SEXENNIAL.

Plea of prescription of bill of exchange barred by letter after six years importing an acknowledgment, No. 219. p. 367.—See *Bill of Exchange*, 8.—*Sequestration*, 10.

PRINCIPAL AND AGENT.

1. Circumstances in which it was held, that the master of a ship who had undertaken a consignment of goods to be disposed of at his foreign port, and who, being unable to get them sold during his stay, had transferred them to a merchant there, with whom the consignee afterwards corresponded without objection, and by whom the goods were sold, was still liable to account for the proceeds, No. 97. p. 156.
2. Held that where a party has acted professedly in the capacity of agent, a petitory action against him, and not against his principal, is incompetent, No. 138. p. 231.—See *Insurance*.

PRISON.

Held incompetent to remit to the Lord Ordinary on the Bills during vacation to declare a prison in the course of erecting legal, No. 434. p. 894.

PRISONER.—See *Poor*, 2.

PROCESS.

I.—1. A reclaiming note which was not marked by a Principal Clerk within twenty-one days from the date of the interlocutor complained of, refused as incompetent, No. 2. p. 2.
2. A party having raised, and for a considerable period insisted in an action of count and reckoning and damages; held competent for him to raise a supplementary summons on exactly the same narrative of facts, but concluding for damages for certain acts, which, though narrated in the former summons, did not form the ground of the conclusion for damages, No. 34. p. 48.
3. A petition and complaint against an election of Magistrates, in name of a member of the Town-Council of the Burgh, having been presented by one counsel, the Court refused to allow it to be withdrawn by another counsel holding a written mandate to that effect from the complainer, before ordering service; but appointed it to be served, reserving all objections, No. 40. p. 52.
4. Circumstances under which a summary complaint against an agent, for an alleged irregularity in conducting an action, was dismissed, No. 104. p. 168.
5. Pending the discussion of a defence of no process stated to a petition and complaint against the election of Magistrates of a royal burgh, a councillor, not being an original party to the complaint, allowed to sist himself, to the effect of maintaining that the complaint had been effectually before the Court within the two months, No. 175. p. 305.
6. A party having raised a summons concluding for reduction of a decree, finding him liable in poor's rates beyond what he was liable for, and also for a declarator as to the rule which ought to be followed in future; and decree of reduction having been pronounced, the Court refused to decide on the declaratory conclusion, as there was no proper party having interest before them, No. 233. p. 413.
7. A petition for recall of an inhibition on a depending action having been refused, and thereafter the action having been abandoned, and a second petition for recall having been presented, but no extrajudicial application having been made for a discharge,—Held,

PROCESS.

(1.) That such an application should have been made, and therefore the expenses refused, but the inhibition recalled of consent; and,

(2.) That it was incompetent to recall the former judgment, or to award the expenses of the first petition, No. 291. p. 602.

8. The holder of a bill having raised diligence on it, of which a bill of suspension was refused; and having thereafter discovered a defect in the bill not pleaded in the suspension by the debtor, but which rendered the execution of the diligence dangerous, and having raised an ordinary action for payment of the bill, and thereafter a supplementary declarator to have it found that he was entitled to go on with his diligence—Held that such declarator was competent, and that no objection lay to it as creating an undue accumulation of actions, No. 292. p. 603.

9. Incompetent to remit a cause from one Division of the Court to another, merely on account of its connexion with a cause which had formerly depended in that Division, No. 380. p. 803.

——— II. ADVOCATION.

Held,

(1.) That fifteen days having elapsed from the date of an interlocutor in the Inferior Court, allowing a proof before a bill of advocation was presented, the bill was incompetent, although it was presented within fifteen days from the time a commission was granted for taking the proof; and,

(2.) That the limitation in point of time prescribed by the Act of Sederunt 12th November 1825, as to presenting such bill, is not ultra vires of the Court, No. 24. p. 38. No. 455. p. 919.

——— III. BILL-CHAMBER.

1. Circumstances under which a first bill of suspension having been refused, and expenses found due, and a second bill being passed, the Court refused to recall the finding of expenses relative to the first bill, No. 31. p. 44.

2. Held incompetent, after a bill has been simpliciter and finally refused without any reservation, to refer the matter to the charger's oath, No. 94. p. 151.

3. Held incompetent in the Bill-Chamber to grant warrant for inspection of goods impledged, No. 117. p. 192.

4. Held incompetent, after a bill of suspension has been passed, and the letters expede, to reclaim against the interlocutor passing the bill,—the remedy being a petition and complaint to recall the letters, if they have been irregularly expede, No. 311. p. 684.

5. A party having raised an action against his law agent, on the ground of being responsible for an insufficient cautioner being received in the Bill-Chamber—Held, that as the Bill-Chamber Clerk had an interest in the question, he must be called as a defender, No. 326. p. 703.—See *Juratory Caution.*

6. A charger in the Bill-Chamber having omitted to intimate the lodging of his answers, and an interlocutor prejudicial to the suspender having been pronounced, a remit made to hear the suspender, No. 453. p. 916. — See *Appeal, Execution pending — Cessio,* 2.—*Homologation—Jurisdiction,* 7.

——— IV. JURY COURT.

Held not imperative to remit to the Jury Court an action of damages

PROCESS.
for breach of contract, and against which there were defences stated in point of law, No. 194. p. 328.—See *infra*, VI. 7.
——— V. MULTIPLEPOINDING.
1. Held,
(1.) That the holder of a fund as trustee for creditors having raised a multiplepoinding, and called certain parties as creditors of the common debtor, is not entitled to dispute their title to appear and object to his condescendence of funds; and,
(2.) That he is not entitled to deduct from the sum to be consigned payments made to the debtor for aliment, without authority of the creditors, No. 13. p. 21.
2. Held that a party is not bound to revise his condescendence of a claim in a multiplepoinding, unless he shall deem that necessary, but that he ought to make appearance to state this at the enrolment for closing the record; and that, if he fail to do so, he is liable in expenses before he can be reponed against an interlocutor dismissing his claim, on the ground that it had not been revised, No. 63. p. 97.
3. The Lord Ordinary having ordained the raisers of a multiplepoinding to consign a certain sum, but having omitted to add the word 'decerns,' whereby the order could not be enforced; and it having become final, and a change of circumstances having taken place—Held not competent to amend the order by adding that word, and that the raisers were entitled to lodge a new condescendence of the fund in medio, No. 182. p. 309.
4. The nominal raiser of a multiplepoinding having allowed decree of consignation to pass against him in absence, and diligence to be raised on it, and having brought a suspension, and the charger not having lodged answers to the reasons—Held,
(1.) That although the charger had failed to do so, yet, in the circumstances, he was not liable in expenses of process; but,
(2.) That the raiser was liable in those incurred relative to the opening up of the decree, No. 221. p. 370.
5. Held that although there was only one arrestment, yet, as there were competing interests for a debt, a multiplepoinding was competent, No. 316. p. 689.
6. The nominal raiser of a multiplepoinding not obliged to consign till relieved of a cautionary obligation come under by him for the common debtor to a much greater amount than the fund in medio, No. 339. p. 725.
7. A party in whose hands arrestments had been executed, having thereafter accepted bills for the fund so arrested in favour of the common debtor, who indorsed them to a third party aware of the arrestment; and the arrestee having raised a multiplepoinding, and the arrester having been preferred—Held,
(1.) That the arrestee was not entitled to the expenses of raising the multiplepoinding; and,
(2.) That both he and the indorsee of the bills were liable to the arrester in expenses, No. 402. p. 836.—See *Jurisdiction*, 8.
——— VI. JUDICATURE ACT.—(See also *infra*, VIII. IX. and XI.)
1. Objections to a record, as irregularly prepared, No. 47. p. 66.
2. Circumstances under which a record was objected to as irregular,

PROCESS.
and a remit made to the Lord Ordinary of new to prepare the cause, No. 70. p. 107.
8. Manner of making up the record in cases where forgery is proponed, No. 98. p. 161.
4. Held not necessary, where a reclaiming note, accompanied with the record, has once been presented, to box a second copy of the record along with the subsequent reclaiming notes on other points of the cause, No. 99. p. 161.
5. Irregular to close a record on mutual memorials, No. 127. p. 208.
6. Incompetent, after the record is closed, to turn an irregular charge into a libel, No. 234. p. 412.
7. A record having been closed in relation to certain allegations, and a remit made to the Jury Court, and it having been proposed to make an issue as to a point not in the record; and this having been objected to, and the case sent back to the Court of Session to have this rectified; and the Lord Ordinary having allowed a new condescendence on condition of payment of the previous expenses, and the party having reclaimed as to this condition, and the other party having acquiesced; the Court adhered; but Observed, that such an order was incompetent, No. 262. p. 518.
8. Cause remitted to Inferior Court, in respect judgment was pronounced without making up a record; but expenses refused to complainer, on the ground of his not objecting in the Court below, No. 271. p. 533.
9. A party having brought forward a new plea after the record was closed, allowed to add it, but that only on payment of the whole previous expenses, No. 352. p. 748.
10. Reclaiming note dismissed, in respect of the record not being attached to it, No. 457. p. 925.

——— VII. REDUCTION.

1. In a reduction of a decree in foro relative to the right to an estate, and the titles thereof—Held that the defender may produce the decree, and thereupon found on it as res judicata, and refuse to produce the titles till the decree is set aside, No. 151. p. 256.
2. Held where the merits in a reduction are greatly mixed up with the question of title,
(1.) That it is competent to compel the defender to satisfy the production, reserving his objections to the title; and,
(2.) That the same course may be adopted in regard to an objection that all the proper parties have not been called, those who have been called being proper parties, No. 303. p. 672.
3. A summons having been raised on the allegation that the pursuers had been induced by the defender to enter into a contract by fraud, and that he had committed a fraud in implementing it, and concluding for repetition of money advanced on the faith of due implement, and for damages—Held not necessary to set aside the contract by a reduction, before insisting in these conclusions, No. 348. p. 739.

——— VIII. PRODUCTION OF WRITS.

1. Party reponed against decree of Lord Ordinary, proceeding on failure to obtemper an order for the production of the original proceedings in a foreign Court, in respect these proceedings were now pro-

PROCESS.
duced; and Observed, that no Court was entitled to demand production of the records of a foreign Court, No. 35. p. 48.
2. Circumstances in which a document not produced with the summons was held not to be in the pursuer's 'custody, or within his power,' under the meaning of the Judicature Act, No. 118. p. 193.
3. Incompetent, pending an action in the Jury Court, to apply to an Inferior Judge to obtain production of books to be founded on in the action, instead of applying by motion to the Jury Court; and held to be no ground for being relieved of the expenses of litigation thereby occasioned, that a party against whom it was brought had returned no answer to several previous extrajudicial applications by letter and protest, No. 137. p. 229.—See *Proof*, IX. 3.—*Records*, 1. 2.
4. A party not entitled to found on documents within his own power, and not produced till after the record was closed, No. 440. p. 900.
——— IX. EXPENSES, &c.
1. Circumstances under which a party who had lodged an irregular condescendence, was found not liable in expenses, No. 59. p. 91.
2. Held discretionary in the Judge to apply to cases previously in Court the provision in the Act of Sederunt Nov. 12. 1825, relative to delaying an award of expenses for the discussion of dilatory defences till the end of a cause, No. 72. p. 108.
3. Held,
(1.) That it is incompetent, in reviewing the decree of an Inferior Court, to allow a proof by commission in the Court of Session, and that the case must be remitted either to the Jury Court or to the Inferior Court; and,
(2.) That a suspender of such a decree, who had led a proof in the Inferior Court, and against whom the term had been circumduced, is liable in payment of the previous expenses, before being allowed an additional proof of his averments, No. 128. p. 211.
4. A pursuer having failed to lodge answers to a condescendence, the defender assoilzied with full expenses, although the latter had been previously subjected in the greater part of the expenses of process, No. 190. p. 321.
5. Held competent for the Lord Ordinary, after the time for lodging a revised condescendence has been prorogated, to order the former papers to be withdrawn, and a new condescendence to be given in, and to allow additional time for doing so, with a view to putting the case in proper shape, No. 205. p. 339.—See *supra*, II. 1. 2.
——— X. UNDER SEQUESTRATION STATUTE.
1. Held,
(1.) That an interlocutor of a Lord Ordinary, during vacation, in sequestration, is not final, but is reviewable by the Inner-House.
(2.) That it is competent for the trustee on a sequestrated estate to apply by summary petition to the Court of Session for warrant to examine persons connected with the business of the bankrupt.
(3.) That the partners in trade of the bankrupt (though not in the business in respect of which he was sequestrated) fall within the meaning of the Bankrupt Statute as persons connected with his business, and that they cannot escape examination by a dissolution of the partnership subsequent to the bankruptcy, though prior to the sequestration; and,

PROCESS.

(4.) That the trustee is not obliged to prepare interrogatories to be communicated to the parties prior to examination, No. 386. p. 809.

2. Where there is opposition to a petition for approval of composition and discharge, the Court will not remit it to be determined by the Lord Ordinary on the Bills during vacation, No. 461. p. 929.—See *Sequestration*, 7.

——— XI. SUMMONS.

1. Held that there being evidence of a summons having been called, it was to be presumed, after the lapse of a long period of time, that it had been duly executed, No. 145. p. 240.

2. Held that privileged summonses against defenders in Orkney must proceed on inducie of 40 days, No. 162. p. 273.

3. Objection to an execution repelled, that it did not contain the designations of the parties, or mention the date of the summons, it being written on a blank sheet originally stitched to the summons, and bearing reference to the foregoing summons, No. 199. p. 334.

4. A party having brought an action concluding for delivery of a bill bearing to be indorsed by him, but which he alleged he had given to the defender without value for a special purpose; and having thereafter averred that his name was forged, but there being no such allegation in his summons, a proof of it was refused, No. 458. p. 926.—See *Title to Sue, &c.* 4.

5. Circumstances in which an amendment of a libel was admitted, without subjecting the party in any previous expenses, No. 426. p. 883.

PROCESS-CAPTION.

Circumstances under which the Court, after the lapse of twenty years, refused to issue a process-caption at the instance of a private party against an agent, to recover title-deeds produced in a process, and for which his receipt stood, No. 1. p. 1.

PROOF.—I. QUALIFIED ADMISSION.

Held that a qualified admission must be taken as it stands, as a piece of evidence along with the rest of the proof; but that it is competent to redargue by contrary evidence the qualification adjected, No. 350. p. 744.—See *Bill of Exchange*, 7.

——— II. BY COMMISSION.

In a declarator of legitimacy, in which a proof was granted of the marriage of the parents—Held competent to take it on commission, in respect of the poverty of the pursuer, and the necessity of the case, No. 263. p. 519.—See *Process*, IX. 3.—*infra*, VII. 2.

——— III. REFERENCE TO OATH.

1. Held that an allegation that a bill had been granted in fulfilment of a promise to pay a tocher, was extrinsic, and no other value being alleged, that the bill was not onerous, No. 77. p. 116.

2. Two obligants on a bill having brought suspensions of separate charges, on the ground that an admitted payment by one of them was to account of the bill; and the charger having, on a reference by the one who had made the payment, deponed that it was not to account of the bill; the Court, in the suspension at the instance of the other obligant, refused to allow him to prove that the payment was to account of the bill, to the effect of getting rid of expenses in which they found him liable, No. 142. p. 236.

PROOF.

3. A party having referred to the oath of his opponent merely whether he was an onerous assignee, and he having deponed that he was—Held not competent to inquire whether he was a bonâ fide assignee, No. 208. p. 348.

4. Oath on reference by a managing partner of a company that, 'to the 'best of his knowledge, a customer had paid all the articles furnished 'to him, and that all the furnishings were entered in the company's 'books, although an error may have occurred'—Held not exclusive of a claim for the price of furnishings proved to have been delivered, but omitted to have been charged in the books, No. 245. p. 472.

5. Reference as to resting owing of a bill of exchange to the oath of trustees of a party deceased allowed, reserving all objections to the effect of the oath when taken, No. 259. p. 515.

——— IV. OATH IN SUPPLEMENT.

1. Circumstances under which it was held, that the payment of a sum of money by a married man to a woman who charged him with being the father of her bastard child, in consideration of receiving from her a declaration that he was not so, constituted a semiplena probatio, and entitled her to her oath in supplement, No. 116. p. 189.

2. Circumstances held not sufficient to amount to a semiplena probatio in an action of filiation, No. 313. p. 685.

——— V. OATH IN LITEM.—See *Nautæ Caupones Stabularii.*

——— VI. PAROLE.

Proof allowed before answer in a question with an onerous purchaser to explain a charter, containing more than one description of the property conveyed, alleged to be contradictory, No. 73. p. 109.—See *Insurance*, 2.

——— VII. PROOF TO LIE IN RETENTIS.

1. An examination of instrumentary witnesses allowed, in initio litis, to lie in retentis, relative to the state of mind of the granter of deeds under reduction on the head of facility, although it was not alleged that they were of an advanced age, or in danger of their lives, but being the only witnesses alive who were present at the execution of the deeds, No. 160. p. 272.

2. Warrant to take deposition of witnesses to lie in retentis limited to those who were seventy years of age and upwards, or in infirm health, and commission refused to be granted generally 'to any of his Ma-'jesty's Justices of the Peace' of a county, No. 436. p. 896.

3. Warrant granted to take the depositions of witnesses, to lie in retentis, who were seventy years old and upwards, in danger of life, or about to leave the country, No. 450. p. 915.

——— VIII. WITNESS.

1. Held,

(1.) That a witness is admissible to prove a statement by the defenders' agent now dead to the husband of the witness, also now dead, and by him to the witness; and,

(2.) That her deposition having been taken and sealed up, it is incompetent, before determining as to her admissibility, to allow her deposition to be opened, in order to ascertain whether the agent's statement was an admission on the part of the defenders, or merely a narrative of what he had heard them say, No. 64. p. 98.

2. Held that a party who had allowed a witness to be examined without

PROOF.
objection, was not afterwards entitled to allege that he had an interest in the cause, and so was incompetent,—he being aware of the objection at the time of the examination, No. 374. p. 794.

——— IX. WRIT.

1. Held that private books kept by a partner, containing among numerous other entries, memoranda relative to the affairs of the company, but which it did not appear had ever been seen by the other partner, could not be admitted as evidence against the representatives of the one partner in an accounting at the instance of the executrix of the other, No. 21. p. 32.
2. Incompetent to hold copies of a summons and interlocutors which had been lost equivalent to the originals, except by consent of both parties, No. 55. p. 77.
3. Held not competent to insist for production of private plans belonging to one of the parties in a cause in modum probationis, No. 196. p. 392.
4. Held that warrants are the only proper evidence of alleged oppressive judicial proceedings and imprisonment, No. 400. p. 831.—See *Cautioner*, 5.—*Insurance*, 2.—*supra*, VI.—*Records*, 1. 2.—*Tenor, Proving of*.

——— X. JUDICIAL REMIT.

1. After a remit of consent to a person of skill, the Court will not allow any other mode of proof, or remit of new to other persons; nor will they require the person to whom the remit has been made to reconsider his report, except on pointed and specific allegations of error, or where he has neglected to obey the directions of the remit, No. 10. p. 19.
2. Circumstances in which a report by persons of skill, on a remit before answer, was held not to bar the parties from resorting to other proof, No. 305. p. 677.
3. Held, in special circumstances, that a tenant whose lease had been reduced as ultra vires of the granter, and who, in his condescendence in an action of damages against the granter's executors, had agreed to estimate the damages according to a valuation made on a judicial remit by two persons of skill, was entitled to enlarge his claim in a revised condescendence, No. 306. p. 678.

PROPERTY.

1. Held that a singular successor of a feu, of which the Magistrates of Edinburgh were superiors, could not be affected by conditions contained in acts of Council, but which were not introduced into the titles, nor referred to, No. 119. p. 195.
2. Under a police act allowing the commissioners of police to line buildings in streets for the benefit of the public, neighbouring proprietors are not entitled to insist that a party who has pulled down his house shall, in erecting a new one, line back his wall, so as to widen the street, No. 135. p. 224.—See *Burgh Royal*, 1.—*Reparation*, 1. 2.

PROPERTY-TAX.

Held that interest having been paid for a series of years, during the period when the property-tax statute was in force, without deducting that tax, it is not competent to withhold payment of a balance to that extent,—the debt on which the interest arose being originally a

West India debt, and being payable in London, and it appearing that no such relief would be allowed in England, or at least that the party must go to the Courts there to seek such relief, No. 211. p. 348.

PROVISIONS TO CHILDREN.

1. Circumstances in which it was found,

(1.) That a younger son having obtained a bond of provision from his father, was preferable, in virtue of a power under a contract of marriage, to his elder brother, who had ratified the bond; and,

(2.) That money advanced by the father for the support of the younger son was not to be imputed in extinction of the bond, No. 322. p. 696.

2. The maxim, debitor non presumitur donare, held not to apply to the case of a father settling provisions on his children to an extent greater than he was bound to do by his contract of marriage, No. 372. p. 790.

RECORDS.

1. Court remitted to the Depute Clerk Register to take steps for restoring a mutilated deed, No. 200. p. 334.

2. Warrant refused for transmitting an extracted process, to be produced in one depending, in respect of the facility of obtaining certified excerpts, No. 275. p. 543.

REDUCTION.—See *Process*, VII.

RELIEF.

An action which had been brought by an agent of one of three parties, for repayment from them all of certain advances for which they were liable, sisted, so far as the amount of one of the shares was disputed, till the relative proportion of each should be determined in a process of relief pending between the co-obligants themselves, No. 147. p. 242.— See *Bill of Exchange*, 8.—*Trust*, 1.

REMUNERATION.—See *Coal*.

REPARATION.

1. The proprietors of feuing ground, who had originally formed a common sewer for the use of the houses to be built on the ground feued out by them, having allowed a greater quantity of sewage water to be conveyed into the sewer than it could adequately carry off, held liable in reparation of damages thereby occasioned, No. 61. p. 94.

2. A party having opposed an application to the Dean of Guild for leave to erect certain buildings, and having been successful in his opposition; but having made no appearance in the House of Lords, and not having intimated that he was not to oppose the appeal—Held, on the judgment being reversed, that his conduct up to the date of the appeal was not relevant to subject him in a claim of damages; but the cause remitted, quoad ultra, to the Jury Court, No. 102. p. 164.

3. Held not necessary to libel malice in an action of damages against Magistrates for wrongous imprisonment and oppression, and founded on alleged irregularities, No. 105. p. 170.—See *Agent and Client*, 2. 5.—*Slander*.

REPETITION.

Circumstances under which it was held that a person who had purchased lands, in the titles of which there was a clause intended to give a right of pre-emption to the superior, and who, in order to get

an entry, paid the superior a sum of money to pass from that right, was not entitled to repetition from the seller, No. 163. p. 274.

RES JUDICATA.

The holder of a bill having been assoilzied from an action concluding for restitution of it, on the ground of having obtained it without value, and in collusion with bankrupts to defraud their creditors, entitled to plead res judicata against an action of reduction on the same grounds, and containing the same conclusions, No. 127. p. 208. —See *Burgh Royal*, 3.—*Decree in Foro—Entail*, 4.—*Title to Sue, &c.* 3.

REI INTERVENTUS.—See *Cautioner*, 5.

RIGHT, ABSOLUTE OR REVOCABLE.

A father having sold a piece of land, and taken the purchaser bound to grant a bond in favour of himself in liferent, for his liferent use allenarly, and of his sons in fee, and having caused his sons to sign a postscript to the missive, agreeing not to call up the money for eight years certain; but no bond having been delivered on the one hand, or disposition on the other, held that the fee of the price was absolutely vested in the sons, and could not be revoked by the father, No. 9. p. 17.

RIVER.—See *Nuisance*.

ROAD.

1. Held that a road on which there were two flights of stairs, was not a horse and carriage road, but only a footpath, No. 43. p. 56.
2. The use of a road, chiefly for the purposes of recreation, having been enjoyed by the public beyond the memory of man, and antecedent to all interruption—Held that subsequent interruptions, which did not prevent the use and enjoyment of the road, were not sufficient to deprive the public of their right, No. 454. p. 917.—See *Title to Sue, &c.* 7. 10.

ROAD ACTS.

1. Road trustees having right to manage, &c. a road from a certain point to 'the city of Glasgow,' held entitled to maintain toll-bars within the bounds of the royalty, if beyond the buildings constituting the actual city, No. 84. p. 135.
2. Held that an exemption from payment of toll in a local road act, was not derogated from or repealed by a general exemption of a more limited nature, introduced into the subsequent general road act, but which was not inconsistent with the exemption in the local act, No. 274. p. 541.
3. An original subscriber to a road not entitled to attach the rents of toll-bars while there was no surplus, after applying them to the purposes provided by the acts of Parliament, and the payment of the interest of money borrowed on the security of the tolls, No. 423. p. 878.
4. Interdict granted against road trustees quarrying stones, pending a discussion as to their right to do so under certain local statutes of which they had the benefit, notwithstanding the provisions of the general road act; and Observed as to that statute, that its effect is to ride over all turnpike statutes, which are to be read as if it were engrossed in them, No. 427. p. 884.
5. Proprietors of a canal not entitled by themselves or others to use the towing-path as a road for carriages or carts conveying passengers who had come by their boats, so as to avoid going along a turnpike

road on which they must have paid toll, the Road Act prohibiting the use of any private passage or way whereby the payment of toll might be avoided, No. 446. p. 909.

SALE.

1. Heritable subjects burdened with debt having been exposed to sale under articles of roup, on the narrative that they were consented to by the creditor, and on the condition that, before payment of the price, an assignation to the debt was to be granted; but not being assigned by him, and the purchaser having paid the price to the exposer without obtaining an assignation—Held, that although the creditor attended and offered at the sale, the debt still remained a burden on the property, No. 152. p. 259.
2. The seller of an heritable property is bound to make up a valid title at his own expense, unless the purchaser has explicitly consented to take the title as it stands in the person of the seller, No. 206. p. 340.
3. Circumstances under which a merchant to whom goods had been sent as having been purchased by him, but which he alleged had been bought by another party, and not having sent notice of the alleged mistake debito tempore, was held liable to pay the price, No. 217. p. 361.
4. Questions raised, but not decided,
   (1.) Whether delivery of part of a machine which a manufacturer was employed to make, and for which a bill was granted, transferred the property of the part; and,
   (2.) Whether (supposing it did not) the landlord had a hypothec over it for his rent of the mill in which it was placed, No. 254. p. 507.
5. A party having bought certain goods, and, after an action had been brought for payment, having returned part of them to the trustee on the seller's sequestrated estate, to be sold by him—Held that the onus of proving a condition that the price effeiring to the goods so returned was to be considered as thereby discharged, lay on the purchaser, No. 312. p. 685.
6. Found,
   (1.) That an offer of a price for lands necessarily includes an offer of interest on the price from the date of possession; and,
   (2.) That under a local act authorizing a compulsory sale of lands to be valued by a Jury, if the proprietor should not accept the sum offered as price and for damages, and declaring that the expense of the trial should be borne by the proprietor or the other party, according as the offer was greater or less than the price and damage found by the Jury, the offer and the verdict not being capable of comparison, the provisions of the statute do not apply, No. 358. p. 764.—See *Repetition*.

SALMON-FISHING.

1. Bill of suspension passed, and interdict granted, as to fishing 'by 'any other mode than the ordinary way of net and coble,' No. 95. p. 153.
2. The estates of a family united into an earldom, the titles to which included a certain salmon-fishing within specified limits, having been forfeited to the Crown for accession to the rebellion in 1715; and having been afterwards purchased (under certain specified exceptions) from the Parliamentary Commissioners by a party who afterwards

SALMON-FISHING.

transferred them to the attainted family; but the conveyances containing merely a general right of salmon-fishing belonging to the earldom, and not mentioning the special right as contained in the ancient investitures—Held that the family had a sufficient title to pursue a declarator of their exclusive right to this fishing, No. 363. p. 776.

SASINE.

1. It is not a sufficient objection to an instrument of sasine written upon the face of a single page, that the notary's docquet bore it to be written 'super hanc et duas precedentes paginas,' No. 93. p. 150.
2. A party claiming to be enrolled as a freeholder, having founded on a charter from Geo. III. to A., and a disposition and assignation by A. to the claimant in liferent, and to A. and his heirs and assignees in fee; and having produced an instrument of sasine in which the only Sovereign named was Geo. IV., and in which it was stated that the attorney held a charter by which 'dict. S. D. N.' had conveyed the lands to A., and also a disposition and assignation by which A. had disponed the lands to the claimant in liferent, and to the heirs and assignees of A. in fee—Held that as there was satisfactory evidence on the face of the instrument to identify the charter and disposition there recited with those founded on, the blunders were not material, and that the claimant was entitled to be enrolled, No. 281. p. 550.
3. Held in a question relative to a freehold qualification, that part of the name of one of the parcels of lands enumerated in the sasine founded on having been written in all the material parts on erasures, the sasine 'was null and void,' No. 285. p. 559.
4. Circumstances under which various alleged irregularities committed in framing an heritable bond and sasine were repelled, No. 355. p. 758.—See *Freehold Qualification*, (3.)

SCHOOLMASTER.

Circumstances in which an heritor was found liable in payment of arrears of schoolmaster's salary for eleven years, notwithstanding his having paid salary for the same lands in another parish during that period, and for upwards of a century before, No. 115. p. 185.

SEQUESTRATION.

1. Held,

(1.) That it is not a valid objection to a candidate for the office of trustee on a sequestrated estate, that his partner in business is trustee on the estate of a party against whom it is alleged claims exist, and that he is cautioner for his partner; and,

(2.) That it is a good personal objection against a candidate for the office that he resides in Edinburgh, and that the sequestrated estate is in Glasgow, No. 51. p. 72.

2. The creditors of a tenant sequestrated under the Bankrupt Act having agreed that the landlord should have a preference over the proceeds of the effects hypothecated to him for his rent on allowing them to dispose of them, and it being alleged that sufficient funds had been realized, but had been paid away by the trustee—Held that it was competent to enforce such a claim by a summary complaint, and that the successor of a trustee is liable for the obligations of his predecessor; but a remit made to ascertain the fact whether there were free proceeds, No. 83. p. 131.

SEQUESTRATION.

3. Held that a trustee on a sequestrated estate, who sists himself as pursuer of an action in place of the bankrupt, is liable to make funds forthcoming in the event of the defender being found entitled to expenses; and that it is not relevant to allege that the funds of the estate are exhausted, No. 106. p. 172.

4. A person who had been allowed by the creditors to enter into possession of a sequestrated bankrupt's estate as interim factor, without finding caution, ordained, pending a competition for the office of trustee, to find caution; and ordered that, on his failure to do so, the management should devolve on the Sheriff-clerk of the county, No. 108. p. 174.

5. Authority refused to make up a new sederunt-book in place of the original, which had been lost; but warrant granted for re-examination of the bankrupt, No. 141. p. 235.

6. A discharge on a composition granted to the sole constituent members of a company under sequestration, both as partners and individuals, in respect of no objection, and the sequestration at the same time declared to remain effectual as to the company and its effects, No. 214. p. 357.

7. Held incompetent to enter into objections to awarding sequestration, other than that the applicant is not within the description of persons described by the statute, or that the concurrence is not such as the statute requires,—other objections forming merely a ground for recall, No. 241. p. 468.

8. In the election of a trustee, held no objection to the vote of a creditor, founded on bills accepted jointly by the bankrupt and another individual, that he had not valued and deducted that individual's security, the bankrupt being in fact the primary obligant, and liable to relieve the other, though not appearing so ex facie of the bills, No. 242. p. 468.

9. A sequestrated bankrupt having been discharged on a composition by a judgment declaring him discharged 'upon' payment of the composition, and having been sequestrated a second time, when a part only of the composition had been paid—Held,

(1.) That the discharge must be interpreted as if it had been in terms of the Bankrupt Statute, '*except* as to payment of the compo-'sition;' and,

(2.) That under the statute the debts of creditors under the first sequestration were extinguished except the composition, and did not revive by the failure to pay the composition, but could rank in the second only for the balance of the composition remaining unpaid, No. 288. p. 565.

10. (1.) Held that the production of a bill in the hands of the preses of a meeting of creditors for the election of a trustee on the sequestrated estate of one of several co-acceptors, is not such a production under section 52d of the Bankrupt Statute as is equivalent to an action, and sufficient to save the bill from prescription as against the other acceptors; and Observed unanimously,

(2.) That the effect of a production in terms of the statute in a subsisting sequestration would not be done away by a subsequent recall, as improperly awarded, No. 327. p. 705.

. An agent in a sequestration held not responsible for neglect in the

SEQUESTRATION.
performance of duties proper to the trustee; and Observed, that the agent could not be in any shape recognised by the Court as an officer in the sequestration, No. 391. p. 804.
12. A meeting of creditors ordered to receive the resignation of the trustee on a bankrupt estate. Observed, that a trustee is not entitled to reject claims duly received, on making up his report as to the concurrence in an offer of composition, No. 398. p. 825.
13. Held that a creditor claiming on the estate of a partner of a company for a debt due by the company, must value his claim against the other partners, and deduct it, otherwise he is not entitled to vote, No. 425. p. 882.
14. The creditors of a bankrupt under sequestration having resolved that his estate should be exposed to sale; and this having become final, and the trustee having advertised a sale, and the bankrupt having presented a petition praying to prohibit it—Held,
(1.) That it was competent to order the petition to be answered, although the sale was thereby suspended; but,
(2.) That on the merits it ought to be refused, No. 432. p. 889.
15. An offer of composition refused as not reasonable.—Question raised, whether the claim of a creditor made on the estate of a bankrupt, after a petition for approval of a composition, can be taken into calculation in ascertaining whether the bankrupt has the requisite concurrence, No. 465. p. 896.—See *Agent and Client*, 3.—*Cautioner*, 2. 3.—*Expenses*, 3.—*Process*, X.

SERVITUDE.
Under a reserved right to coal, with the privilege of transporting, &c. and doing every thing necessary thereanent, the party in right of the coal is not entitled to take materials out of the lands for the purpose of forming the roads required for the transportation of the coal, No. 178. p. 307.—See *Road*, 1. 2.

SETTLED ACCOUNT.
Held that it is not competent, after a regular settlement of accounts and a species of transaction, to open them up to the effect of reviewing the principles on which the settlement has been made, No. 211. p. 348.

SHERIFF.—See *Jurisdiction*, 9.—*Poor*, 9.

SHERIFF-CLERK.
Sheriff-Clerks not precluded by statute 6th Geo. IV. from appointing deputies in circumstances where that is necessary for conducting the business, No. 252. p. 503.

SHERIFF-CLERK'S FEES.
1. Repetition ordered of overcharges of Sheriff-Clerk's fees not sanctioned by A. S. March 16. 1748; but,
2. Expenses refused, in respect of the party not having applied in the first instance to the Sheriff, and of his having concluded for removal or censure of the Clerk, as to which he had no title, No. 113. p. 183.

SLANDER.
1. (1.) A party held liable in damages for defamatory statements made malâ fide, and not pertinent in the course of judicial proceedings.
(2.) A sum of damages awarded in the Inferior Court modified

TITLE TO SUE OR BE SUED.

before the Dean of Guild for authority to build, entitled to make appearance, and plead defences, No. 119. p. 195.

6. Circumstances under which it was held that the tutor of a pupil was entitled to pursue a reduction of a lease, although inventories had not been made up, No. 174. p. 301.

7. An action of reduction of a decree of the Justices of the Peace, ordering a road to be shut up, and of declarator of right to it having been brought, among others, by several parties, describing themselves as servants—Held that unless they were householders they had no title to pursue, No. 195. p. 330.

8. A member of a Board of Commissioners, elected under authority of an act of Parliament, is entitled to pursue a reduction of an act done by the Board, on the ground of its having been carried by the votes of two Commissioners who were disqualified, without his being obliged to conclude for reduction of the appointment or commission in virtue of which these persons acted, No. 213. p. 355.

9. The Court sustained a libel and charge directed against an Insurance Company not incorporated by charter, and against the manager and certain individual directors who had subscribed the policy of insurance on which the action was brought, No. 226. p. 375.

10. Action for the removal of obstructions erected across a road, alleged to be a public road, sustained at the instance of two proprietors in the parish designing themselves by their estates, and as 'two and a 'committee of the trustees for the parish, &c. under the Statute 'Labour Act for the county,' &c. No. 227. p. 381.—See *Burgh Royal*, 2.—*Justice, Administration of*, 1.—*Partnership*, 1. 3. 4.—*Principal and Agent*, 2.—*Tutors and Curators*, 2.

TRUST.

1. Certain persons holding an entailed estate in trust, under condition that they should only denude in favour of the heir when the whole debts affecting the estate were extinguished, and having denuded while certain debts remained unpaid, to answer which, however, they stated that they had retained funds—Held, on these debts being demanded from a succeeding heir, that he was entitled to decree in an action of relief, not only against the trustees, but also against the representative of the heir in whose favour they had denuded, and who had granted them a discharge, No. 68. p. 104.

2. An acceding creditor to a voluntary trust, under which the trustee had entered into possession of the estate, having obtained from the bankrupt a quantity of grain and sold it—Held not entitled to set off the price against his debt, or retain it in payment of his dividend, but bound, in an action at the instance of the trustee, to consign the whole amount, without deduction of part which he had failed to recover, or of payments made to the bankrupt without authority of the trustee, No. 79. p. 122.

3. A creditor of a trust-estate, under a voluntary trust, having succeeded in a litigation with the creditors of the truster in establishing his claim against the trust-estate—Held that, in accounting with him, the trustee was not entitled to deduct the expenses of the litigation, No. 122. p. 203.

4. Circumstances under which it was held that testamentary trustees, who were required by the testator to invest the residue of his funds

TENOR, PROVING OF.

1. Circumstances in which the Court deemed in a proving of the tenor of a written cautionary obligation, although there was no proof of any special casus amissionis, No. 249. p. 497.
2. Circumstances in which, by consent of parties, the proving of the tenor of a bond was dispensed with, and in which the Court found its import sufficiently instructed by written documents recovered under a diligence, and parole proof taken on commission, No. 401. p. 831.
3. Circumstances in which a proving of the tenor of a deed was allowed to proceed, although there were no adminicles expressive of its precise terms, No. 460. p. 927.

TESTAMENT.

A party who had made a testament in America, disposing of all his property, having thereafter come to Scotland, and executed a mortis causâ assignation of the stocking of a farm there, and having subsequently recalled that assignation, and declared that the farm-stocking 'should be considered as part of his executry, and be regulated by 'the general law of moveables in its appropriation,' but not having revoked his testament—Held that the farm stocking fell to be distributed under the testament, and did not go to the nearest of kin according to the law of Scotland as to intestate succession, No. 346. p. 734.—See *Trust*, 4. 7. 9.

TITLE TO SUE OR BE SUED.

1. Held, that in order to entitle a party to insist in an action of reduction of a conveyance or transfer of money by a sequestrated bankrupt, as assignee of the creditors, he must have an assignation to that special effect, No. 7. p. 11.
2. Probate of a will and letters of administration taken out from an English Prerogative Court by the survivor of three executors nominated in an English will, held a sufficient title to pursue in a Scotch Court, although the executor had no residuary interest under the will,—he always confirming before extract, No. 19. p. 29.
3. Circumstances in which it was held that a party founding on an unstamped and improbative document of debt alleged to have been obtained by fraud, and who had been called in a process of multiplepoinding, was entitled to pursue a reduction of a decree of preference in his absence, and that such decree did not form a res judicata, No. 22. p. 34.
4. A party, by deed of settlement, left heritable property to his widow, failing whom, to substitutes. The widow, after having been infeft, executed a conveyance mortis causâ to the exclusion of these substitutes, who brought a reduction of her settlement ex capite lecti, describing themselves as heirs of provision to the original granter, but narrating his deed of settlement, whereby their true characters as heirs of provision to the widow appeared—Held,

   (1.) That so libelling themselves, the summons was inept to support a conclusion of reduction, ex capite lecti.

   (2.) That a supplementary summons was incompetent; and,

   (3.) That the objection was one which could not be waived by the parties having gone to issue without stating it; but right to bring a new action in the proper character reserved, No. 60. p. 92.
5. The City Chamberlain having been called as a party to a process

TITLE TO SUE OR BE SUED.

before the Dean of Guild for authority to build, entitled to make appearance, and plead defences, No. 119. p. 195.

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4. Circumstances under which it was held that testamentary trustees, who were required by the testator to invest the residue of his funds

TRUST.
in heritable property or bank security, and who, acting under the advice of counsel, had declined, on the requisition of all concerned, to invest the residue in Government stock, and brought a process of multiplepoinding and exoneration, in the course of which the fund was paid to those having right, were liable in the loss thereby sustained, No. 192. p. 322.

5. A party having accepted the office of trustee, along with another, for creditors, and having allowed his name to be used as such, but denying that he had intromitted with the funds, and alleging that this had been done exclusively by the other trustee, who was now bankrupt—Held,
(1.) That he was, notwithstanding, accountable to a creditor, as if he had intromitted; and,
(2.) That a decree cognitionis causâ is sufficient evidence of a debt in a question with such trustee, No. 210. p. 346.

6. Several trustees having been nominated by a deed of settlement, and three declared to be a quorum, and all of them having accepted, and the number having been reduced by death to three—Held that one of them, who, although he had accepted, yet declined to act, was bound to concur with the other two in all reasonable and proper acts of administration, and in particular in uplifting part of the trust-funds, the loan of which he alleged he had disapproved of, No. 216. p. 358.

7. A party having by a trust-deed conveyed his whole funds, interest and proceeds thereof, to trustees, to be vested in lands which were to be annexed to his entailed estate; and the heir at law and of tailzie having claimed the interest of the fund not invested in land from and after the expiration of a year from the death of the truster; and the Court of Session having assoilzied the trustees from the claim, and the House of Lords having remitted, to take the opinion of all the Judges, the Court adhered, (reversed,) No. 248. p. 476.

8. The managing trustee under a deed of settlement having, at receiving a discharge of a count and reckoning, granted a letter to the pursuers, declaring that certain claims against his brother, another of the trustees, were not settled, and should be determined by a submission—Held that both these parties were accountable under that letter, No. 383. p. 806.

9. A party having conveyed his whole property, and, inter alia, an heritable bond, to persons who had been nominated his executors in a will previously executed, or the survivor, in trust for the purposes declared in the will, or to be declared in any future will; and having subsequently executed a second will in the English form, and improbative by the law of Scotland, revoking all former wills and 'testamentary dispositions,' and containing a settlement of all his property, including the heritable bond—Held,
(1.) That the trust-deed was not revoked; and,
(2.) That the survivor of the two trustees was entitled under it to take up the heritable bond, and obtain an entry from the superior, No. 437. p. 897.—See *Nobile Officium*.

TRUSTEE.—See *Proof*, III. 5.—*Trust*.

TUTORS AND CURATORS.

1. Held that a discharge of an heritable bond, granted by persons in

TUTORS AND CURATORS.

the capacity of tutors after their office had expired, was null and void, and that they were bound to relieve the parties to whom the discharge had been granted of all the consequences thereof, No. 87. p. 136.

2. (1.) Tutors who had intromitted with their pupils' effects, before making up inventories, removed as suspect; and,

(2.) The disclamation of the nearest of kin in an action for removing tutors no bar to the title of the pupils, and of a tutor ad litem to insist in it, No. 110. p. 177.—See *Curator Bonis—Decree in Absence*, 1.—*Parent and Child*, 1.—*Passive Title*, 1.—*Title to Sue, &c.* 6.

USURY.

(1.) A party held barred from objecting to a deed as illegal on the head of usury; and,

(2.) A sale of Government stock of the value of £7620 for an heritable bond of £10,000, and interest thereon at five per cent., and of which the principal sum was to be payable only on certain contingencies, held not usurious, No. 150. p. 251.

VITIATION.—See *Bill of Exchange.*

VITIOUS INTROMISSION.—See *Passive Title.*

WARRANDICE.

1. A party having purchased lands with the price of teinds sold by him under a warrandice against augmentations, and taken the lands to himself in liferent, and to his son and a series of heirs in fee; and augmentations having been granted; and an adjudication founded on the warrandice having been brought—Held that an heir, who had made up titles to the fiar, and not to the liferenter, could not oppose it, No. 49. p. 68.—See *Landlord and Tenant*, 8.

2. Circumstances in which a party who, a few weeks before the judgment of the House of Lords setting aside the Queensberry leases, obtained a sublease of one of the farms 'to the termination' of the principal lease, but without any clause of warrandice, was held entitled to relief and damages from the principal tenant, No. 100. p. 162.

3. Construction of a clause of, No. 309. p. 681.

James Macdonald's Session

CASES

DECIDED IN

THE COURT OF SESSION,

WINTER 1826–1827.

JOSEPH M'LEOD, Petitioner.—*Greenshields.* No. 1.
ROBERT HILL, W. S. Respondent.—*Maidment.*

Process-Caption.—Circumstances under which the Court, after the lapse of twenty years, refused to issue a process-caption at the instance of a private party against an agent, to recover title-deeds produced in a process, and for which his receipt stood.

M'LEOD presented a petition to the Lord Ordinary on the bills, stating that prior to 1804 he had raised two actions in this Court, in which he had produced certain title-deeds, forming a part of the titles to a property belonging to him: that the agents for the defenders were Messrs. Ninian and Robert Hill, W. S., and that decrees of absolvitor had been obtained on the 14th of February of that year: that it appeared from the receipt-book of the clerk to the process, that on the 12th of May 1805 the whole writs in the inventory had been borrowed by the apprentice of Mr. Robert Hill, and that there was a marking, dated the 25th of April 1808, bearing that they had been all returned, except the above title-deeds. He therefore prayed the Lord Ordinary 'to grant caption against the said Robert Hill for the re-'turn of the whole productions made in the foregoing processes, 'at least for the return of the title-deeds before mentioned,' and to find him liable in expenses. Mr. Hill, after stating that he had, without success, made an extensive and laborious search for the deeds, and that he could find nothing relative to them except a letter from the petitioner's agent in April 1808, requesting that

Nov. 16. 1826.*

1ST DIVISION.
Bill-Chamber.
Lords Meadowbank and Medwyn.
H.

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* Both Divisions were engaged on the 14th and 15th in a private consultation as to cases remitted from the House of Lords.

they might be given to Mr. Boyd, writer to the signet, or his clerk, which he presumed must have been done, pleaded in defence,—1. That it was not competent for a private party to apply for a caption; that this could only be done by the clerk of Court, the proper custodier of the writs, in whose favour the receipt had been granted; and that there was no evidence that the petitioner had any right to the deeds in question, which were not nominatim in his favour;—and, 2. That after a case had ceased to depend in Court, and at all events post tantum temporis, it was not competent to issue a caption even at the instance of the clerk; and more especially as the receipt had been granted at a time when there was great neglect in deleting them, even when the papers were actually returned. The Court, on the report of the Lord Ordinary, dismissed the petition, and found Mr. Hill entitled to expenses.

LORD PRESIDENT.—The presumption is, post tantum temporis, that the deeds must have been either returned to the clerk, or given up to the petitioner's agent. Besides, we have no evidence that this person has any right to these deeds, and therefore I doubt whether he can competently apply for a caption in this summary form. The clerk of the process, in whose favour the receipts are granted, does not require to show an interest in the deeds, but a private party must.

LORD BALGRAY.—The letter in April 1808 confirms the presumption that the deeds must have been given up. It is impossible to allow a caption to be issued.

LORD GILLIES.—I am clearly of the same opinion.

LORD CRAIGIE.—There must be some prescription of these receipts. We cannot issue a caption in such a case as this.

Respondent's Authorities.—1. Beveridge, 250; Agnew *v.* Hathorn, 1813, (not rep.); Horne, Feb. 18. 1825, (ante, Vol. III. No. 376.)

A. BAYNE,—J. B. GRACIE, W. S.—Agents.

No. 2.

ANDREW STEWART, Suspender.—*Skene—Ivory.*
GILBERT LANG, Charger.—*Jeffrey—Brownlee.*

Process.—A reclaiming note which was not marked by a Principal Clerk within twenty-one days from the date of the interlocutor complained of, refused as incompetent.

Nov. 16. 1826.
1ST DIVISION.
Lord Meadowbank.
S.

IN a suspension at the instance of Stewart against Lang as assignee of a bill, the Lord Ordinary having found that Lang was an onerous holder, Stewart presented a reclaiming note, which was sent to the summar roll, and thereafter remitted to the Outer House, to form part of the trials of Lord Probationer Corehouse.

Lang then objected that the reclaiming note had not been marked by a Principal Clerk of Session within the reclaiming days, (but the objection was waived, to enable his Lordship to report on the merits); and after he had done so, and stated his opinion that the interlocutor should be altered, the objection was repeated and sustained.

J. Dickie, W. S.—Gilbert Lang, W. S.—Agents.

Sir James Colquhoun, Bart. Suspender.—*Forsyth.*
Robert Colquhoun, Charger.—*Speirs.*

No. 3.

Nov. 16. 1826.
1st Division.
Bill-Chamber.
Lord Medwyn.

Sir James Colquhoun having purchased a property from the charger, and conceiving that the latter was prohibited by the terms of an entail from selling, presented a bill of suspension, which the Court, on the report of the Lord Ordinary, passed, to try the question.

D. Fisher,—G. Dunlop, W. S.—Agents.

J. Watson, Advocator and Charger.—*Graham Bell.*
J. Grindlay, Respondent and Suspender.—*Skene.*

No. 4.

Apprentice—Statute.—A master currier having ceased to take out the licence required by certain acts of Parliament, held,—1.—That he was not entitled to enforce the penalty in the indenture of an apprentice, whom he alleged to have violated his agreement;—and,—2.—That the apprentice was entitled to be freed from the indentare, though actually receiving instruction in the trade.

Nov. 16. 1826.
2d Division.
Lord Cringletie.
M'K.

By the acts 56th Geo. III. c. 110, § 7, and 52d Geo. III. c. 94, § 7, it is declared that no tanner shall, by himself or by any other person, carry on the trade of a currier, or other artificer exercising the cutting or working of leather; and by the 24. Geo. II. c. 41, it is provided, that every currier shall, under certain penalties therein specified, take out a licence annually, and all persons are prohibited from exercising the trade, by themselves or others, without such licence. With a view to evade the former of these statutes, tanners often employ as foreman in their works a person who takes out a licence as a master currier, and to whom the apprentices are bound, but who in reality acts as the servant of the tanner. In this way Johnston, a tanner in Glasgow, employed Watson, the advocator, with whom the respondent Grindlay entered into indentures as an apprentice for the period of seven years, each party binding himself to perform the conditions (which were those usual in such contracts) under a

penalty of £30. Under this indenture Grindlay continued to work as an apprentice with Watson for five years till 1823, when the latter was removed from his office of foreman. He was succeeded in this situation by one Wright, and he thereafter worked merely as a journeyman, and ceased to take out a currier's licence; but he did not transfer Grindlay's indenture to Wright, by whom the licence was now taken out, and to whom the indentures of the other apprentices were transferred. Grindlay continued, without objection, to work under and receive instruction from Wright till June 1824, when he was turned away for alleged misconduct. He then presented a petition to the Justices of Peace of Lanarkshire, without founding on the circumstance of Watson not having a licence, but praying to have it found that Watson was 'either bound to give the petitioner regular employ-'ment, or to declare the indenture forfeit, and at an end, and in 'that case to deliver it up to the petitioner.' Watson defended himself against this application on the ground that Grindlay's conduct justified his dismissal, and the Justices, after a proof, sustained this defence. Grindlay then contended that Watson having no licence as a currier, and having had none for 16 months past, was not in a situation either to enforce the indenture, or to fulfil his part of it by instructing him in the trade. The Justices, in consequence of this plea, found 'the indenture 'forfeited, and that the defender has no further claim to the ser-'vices of the pursuer under the same,' and granted warrant for delivering it up to Grindlay. In the mean time Watson had given Grindlay and his cautioner a charge for payment of the penalty in the indenture, as having been forfeited by Grindlay's misconduct. Of this charge Grindlay and his cautioner brought a suspension, while Watson, on the other hand, brought an advocation of the judgment of the Justices on Grindlay's petition. By Watson it was pleaded,—

1. That although the carrying on the trade of a currier without a licence subjected the party who did so to certain penalties, yet the statutes (which were only for the protection of the revenue) did not render void an indenture with such a party, so long as the apprentice was properly instructed, which was not denied to have been the case here; and that it was not requisite, as was found in the case of Gardiner, that the master with whom the indenture was entered into should personally instruct the apprentice.

2. That the proceedings of the Justices were informal, in so far as they did not first allow him an opportunity of giving Grindlay regular employment.

3. That the Justices had no jurisdiction to warrant them to declare an indenture forfeited, and to ordain it to be delivered up, their powers depending on statute law, which did not confer such jurisdiction: And,

4. That the dismissal of Grindlay was fully warranted by his misconduct, as proved before the Justices.

On the other hand, it was maintained for Grindlay,

1. That Watson, not having a licence, was prohibited by act of Parliament from carrying on the trade of a currier by himself or others, and was thereby necessarily incapacitated from legally retaining an apprentice; and besides, that he had actually ceased to be a master currier for sixteen months.

2. That it would have been absurd in the Justices to allow Watson an opportunity of giving regular employment, when he was confessedly incapacitated from doing so.

3. That the proceedings of the Justices were not of a declaratory nature, but in reality a summary procedure competent to them, if not by statute, at least by universal usage, warranting them to decide all such matters between master and servant, and at all events that this plea did not affect the question in the suspension: And,

4. That even if a sufficient cause of dismissal had been proved, (which was denied,) he was not bound to fulfil his part of the indenture to a master incapacitated from implementing the obligations on the other side.

The Lord Ordinary suspended the letters in the suspension, (which his Lordship considered to be independent of the question in the advocation,) 'because, whether the Justices of the 'Peace were competent to declare the indenture forfeited, and 'to deliver it up, the Lord Ordinary is clearly of opinion, that 'before any master is entitled to charge his apprentice to imple-'ment the indenture, and to pay the penalty therein stipulated 'for non-performance, he the master must be in a condition to 'perform his part thereof;' and his Lordship stated his opinion that Watson, in consequence of not having a licence, was not in a condition to do so, either by himself or any other person.

Against this interlocutor Watson reclaimed, and the advocation having been reported by the Lord Ordinary on Cases, the Court in the suspension unanimously adhered, and in the advocation advocated the cause; and, 'in respect of the whole circumstances,' found 'Grindlay free from the term of the indenture in question,' and expenses due in both processes.

Lord Alloway.—It is clear that without a licence Watson could not carry on the work of a currier, and this case is therefore totally

different from that of Gardiner, where the man carried on a legal trade, though not giving constant personal attendance. There may perhaps be a little doubt as to the power of the Justices to ordain the indentures to be given up, but still this party is substantially entitled to be freed from them.

The other Judges concurred.

Advocator's Authority.—Gardiner, July 13. 1775, (F. C.)

J. USHER,—J. BURNESS,—Agents.

No. 5. Rev. J WILSON and J. ALPINE, Pursuers.—*Moncreiff—D. Macfarlane.*
GLASGOW SOCIETY of TEACHERS, Defenders.—*More—Penny.*

Society.—Two original members of a benefit society, (the rules of which reserved a power of alteration,) having paid a certain sum of entry-money declared by the original regulations to free the members paying it from all annual contributions, held not entitled to certain additional benefits subsequently provided to the members, without contributing the additional annual payments established by the society at the time of making this increased provision.

Nov. 16. 1826.
2D DIVISION.
Lord Mackenzie.
F.

IN 1794 a society was formed by a number of the schoolmasters of Glasgow and its neighbourhood, the object of which was, by the regulations, declared to be 'for the relief of such ordinary members, their widows and children, as by bodily infirmity, or misfortunes of any kind, might be deprived of the means of supporting themselves in a comfortable manner;' and it was provided that each member, when 'in need,' should receive 'at least a guinea,' and the widow of a member, when in necessity, half a guinea a month. The funds for this purpose were, by the regulations, to be raised by a fine of three guineas as entry-money, and payment by each member of four shillings annually in name of quarter accounts; but with this provision, that if any member should pay three guineas in addition to his entry-money, 'no more quarter accounts can be demanded of him. This advance 'entitles him to the denomination of a free member of the society 'in all time coming.' A power was, however, reserved of altering the rules of the institution, as might be judged proper. The pursuers, then teachers in Glasgow, were original members of this society, and by the payment of three guineas in addition to their entry-money they became entitled to the privileges of free members. Having, however, been appointed to parochial charges in the Church of Scotland, they were not in the use to attend any meetings of the society, which in 1815 took advantage of the Friendly Society Act, and adopted a new code of

rules, which was regularly confirmed by a Justice of the Peace. By the new regulations the entry-money was raised to five guineas, and the annual subscription to £1; but it was declared that the original members, who were mentioned by name, (including the pursuers,) 'may still continue to pay the same sum 'as formerly, and have the same privileges as the other members, 'and be entitled to all the advantages of the society.'

In particular, the benefits to be derived from the society were considerably increased by these new rules, members unable to follow their profession from old age or bad health, widows and children, (where no widow was left,) were to receive an annuity of £15, without requiring that they should be in a state of want; but it was provided, that if the annual income of the society should at any time be unequal to pay these annuities, 'in that 'case an additional quarterly payment, not exceeding five shil-'lings, shall be levied from each member, till such time as the 'funds of the society shall become adequate to these payments.'

The funds having, in 1823, become inadequate to bear the annuities with which they were burdened, the society resolved to levy this additional quarterly payment of five shillings, which they demanded as well from the original as the new members, allowing, however, the free members a deduction of four shillings in the year, as the interest of the three guineas advanced by them in addition to their entry-money. The pursuers thereupon brought an action of declarator to have it found,

'1. That the pursuers, having purchased to themselves the be-'nefit of free members, became, in virtue of the old laws and re-'gulations, exempted from the payment of all quarterly accounts 'thereafter.

'2. That the clause of exemption was a fundamental law of the 'society, which could at no future period be altered to the preju-'dice of the pursuers, without their special consent.

'3. That, at any rate, in the new laws and regulations there is 'no provision which alters the above law, or which can entitle the 'society to exact from the pursuers any payment whatever; and, 'lastly, that the pursuers having, by the payments made by 'them, secured all the benefits and privileges of the society, 'however great these might become, those arising out of the 'new laws accrue to, and can be claimed by them and their 'widows and children, in the same manner that any other mem-'ber, or the widow or children of any other member, can claim 'them.'

The Lord Ordinary, 'in respect that the pursuers claim 'right, under the new regulations, for themselves and families,'

found that they were not entitled to complain of the same, and therefore assoilzied the society; and the Court unanimously adhered.

J. C. WILSON, W. S.—W. and A. G. ELLIS, W. S.—Agents.

No. 6.

J. SMYTH, W. S. Pursuer.—*Jeffrey—Cuninghame.*
Q. D. NINIAN, Defender.—*Moncreiff—Monteith.*

Jurisdiction—Foreigner—Arrestment.—Held,—1.—That an agent employed by a trustee on a sequestrated estate to conduct a process for behoof of the estate, cannot proceed in a Court in this country against a foreigner who has claimed on the estate for payment of his business account of expenses, without first establishing a jurisdiction by arrestment jurisdictionis fundandæ causâ; and,—2.—That it is competent to an arrestee to plead in a forthcoming that the decree of constitution obtained by the pursuer against the foreigner was obtained without so establishing a jurisdiction.

Nov. 16. 1826.

2D DIVISION. Lord Mackenzie. F.

BEAUFOY, BIDDLE, and JAMES, merchants in London, became, in 1794, creditors of Stewart and Ninian, a company carrying on business in Greenock, of which the partners were Charles Stewart and *Quintin* Ninian. This company was dissolved by the death of Quintin Ninian in 1799, and a new company, under the same firm, was immediately formed by Stewart, along with *Alexander* Ninian, who likewise died about a year thereafter; and a sequestration was then awarded against this second company, and Stewart as an individual. In this sequestration a claim was lodged by one Young, as mandatory for Beaufoy, Biddle, and James, accompanied by an affidavit on their part specially describing their debt as contracted in 1794, and being due by Stewart and Ninian, and Charles Stewart and *Quintin* Ninian, the individual partners thereof. Mr. Smyth, writer to the signet, having been employed by the trustee on the sequestrated estate as agent, conducted in this Court an action in name of the trustee against the representatives of Quintin Ninian, (the partner of the first company,) to recover from them a sum alleged to have been due by Quintin Ninian to Stewart. In this action, (which was unsuccessful,) a considerable business account was incurred to Mr. Smyth, for payment of which (the sequestration being still subsisting) he raised an ordinary action against the creditors, calling among the rest Beaufoy, Biddle, and James, without, however, taking any steps to found a jurisdiction by arrestment of funds in this country. They made no appearance, and decree in absence was pronounced against them, on which Smyth obtained letters of horning, containing warrant to arrest, in virtue of which he used arrestments in the hands of the de-

fender, as being indebted to Beaufoy, Biddle, and James, and subsequently brought the present action of forthcoming.

In defence it was pleaded that the arrestment was invalid, in so far as it proceeded on a decree against foreigners, against whom no jurisdiction had been established by a previous arrestment jurisdictionis fundandæ causâ.

To this it was answered for Smyth,

1. That Beaufoy, Biddle, and James having lodged a claim in the sequestration, (which claim, though for a debt due by the company, who were not sequestrated, was a good claim against the estate of Stewart, who was sequestrated as an individual,) they and all the creditors must be held as his employers in the actions instituted by the trustee for their common behoof; and having thus raised an action in this Court, they, on the principles of reconvention, had subjected themselves to the jurisdiction of the Court in all matters necessarily incident to their suit; that the agent's claim for his expenses was of this nature, and consequently that a previous arrestment was not necessary to found a jurisdiction—an inference supported by the analogy of the Act of Sederunt 1806: And,

2. That this defence was not competent to an arrestee, but only to the common debtor, as the diligence, and decree on which it proceeded, were ex facie correct, so that there was no nullity which rendered it unsafe for him to pay.

On the other hand, it was pleaded for the arrestee,

1. That the principle of reconvention could not apply, except where there were counter actions; and further, that the claim of Beaufoy, Biddle, and James, which was against the first company, had been lodged by their mandatory on the mistaken supposition that it was the first company which was sequestrated, consisting of Charles Stewart and Quintin Ninian, and not against that of Stewart and Alexander Ninian; and that so far from the action, for the expenses of which Mr. Smyth's action was brought, having been for the behoof of Beaufoy, Biddle, and James, it was contrary to their interest, as its object was to take funds from the estate of Quintin Ninian, and transfer them to the estate of Charles Stewart, thus rendering them divisible among the creditors of the second company: And,

2. That the plea was perfectly competent to the arrestee, as he was not in safety to pay while there was an intrinsic nullity in the diligence, and unless the common debtors were made properly parties to the forthcoming, which they could not be without an arrestment jurisdictionis fundandæ causâ.

The Lord Ordinary having sustained this defence and assoil-

zied, Smyth reclaimed; and the Court, after ordering Cases, adhered so far as the defence was sustained; but, in place of assoilzieing, dismissed the action.

Lord Justice-Clerk.—It does not appear to me that either of Mr. Smyth's pleas are well founded, even taking the facts as to the claim of Beaufoy, Biddle, and James, to be exactly as he states them. It is entirely out of the question for him to obtain any assistance from the Act of Sederunt 1806, which applies only to the ordinary case of agent and client, where the former is directly employed by the latter; and on the general point I am not able to perceive such a connexion between him and the common debtors here as entitles him to avail himself of the doctrine of reconvention, and to the effect of obtaining decree against these foreigners, without establishing a jurisdiction by arrestment. As to the cases quoted for the pursuer, the only one which applies at all is that of Mackrill; and so far as the principle of reconvention was involved in that case, there were counter actions. I am satisfied also that the defence here is perfectly competent to the arrestee, who cannot pay in safety, if the common debtors have not been brought properly under the jurisdiction of the Court.

Lord Pitmilly.—If Beaufoy, Biddle, and James had been the direct employers of Mr. Smyth, I should have doubted much whether an arrestment jurisdictionis fundandæ causâ would have been necessary to warrant an action against them for payment of the expenses; and I rather think that in such a case an agent would be entitled, without such arrestment, to pursue his client, though a foreigner, either by an ordinary action, or under the Act of Sederunt; not, however, on the principle of reconvention, which does not apply to such a case, but on this,—that parties bringing actions in their own names in this Court subject themselves to its jurisdiction, to the extent of the agent's claim of expenses. Here, however, the circumstances are very different, as the action was brought by a trustee, and it is not even made out that it was for the interest of this company, but rather the reverse; and there can be no doubt that the objection is competent to the arrestee.

Lord Alloway.—I concur in holding that the defence is perfectly competent to the arrestee, and that if Beaufoy, Biddle, and James had directly employed Smyth, he might have got decree against them for his expenses, without any arrestment jurisdictionis fundandæ causâ; but then I cannot draw any distinction between a direct employer and claimants under a sequestration, who are directly liable to the agent employed by the trustee. There is, however, some difficulty as to the matter of fact; but it rather appears to me that the Company had an interest in the sequestration in which Mr. Smyth was employed; and in this view there would be room

for the application of the doctrine of reconvention, the principle of which is, that no person can avail himself of the jurisdiction of this country, without subjecting himself in it to all incidental claims. At the same time, if the action was, in point of fact, contrary to the interest of that company, it would greatly affect my opinion.

LORD GLENLEE.—As to the arrestee's title to plead the objection, it is notorious that a forthcoming cannot be brought without making the common debtor a party; and unless he is properly made a party, the arrestee cannot pay in safety. As to the other matter, though I will not be rash in laying it down that an agent is always entitled to take decree against his foreign employer, even when directly employed, still a great deal may be said for that doctrine. It is, however, a very different thing where the agent's claim arises out of a direct mandate to him, and where it arises from the operation of the law as in regard to the liability of creditors in a sequestration to the agent employed by the trustee; and in the circumstances of this case, I can have no doubt of the interlocutor of the Lord Ordinary.

Pursuer's Authorities.—Kames' Elucid. Art. 21; 2. Bank. 477; Kirkhead, Feb. 9. 1628, (4839); Vans v. Sandilands, 1675, (4840); Balle, June 21. 1763, (F. C.); Mackrill, June 17. 1778, (4885); Mansfield, Ramsay, and Co. June 17. 1795, (F. C.)

Defender's Authorities.—1. Ersk. 2. 19; 2. Bell, 73; Voet. ad Pand. 5. 1. 78; 2. Huberi Præl. 849.

J. SMYTH, W. S.—CAMPBELL and MACDOWALL,—Agents.

JAMES GLEN, Pursuer.—*Cuninghame—Skene.*
SMITH GLEN, Defender.—*Moncreiff—Sandford.*

No. 7.

Title to Pursue.—Held, That in order to entitle a party to insist in an action of reduction of a conveyance or transfer of money by a sequestrated bankrupt, as assignee of the creditors, he must have an assignation to that special effect.

Nov. 17. 1826.
1ST DIVISION.
Lord Medwyn.

THE late William Glen, proprietor of a distillery in Linlithgowshire, entered into a contract of copartnership in 1809 with his two sons, John and James, by which it was agreed that William was to have two shares, while John and James were each to have one. Neither the distillery nor the utensils were to form part of the stock of the company. William and his son John were partners of the Falkirk Union Bank, which was sequestrated under the bankrupt act in October 1816. Besides those sons, William had another, Smith, the defender, in whose favour he made an entry in the cash-book of the distillery company on the 1st of October, by which he transferred to him £1000, and on

the 3d of the same month he made a counter entry, by which he debited himself with that sum. By virtue of the sequestration, the trustee on the Falkirk Bank acquired right to the respective shares and interests of William and John Glen in the distillery company, which continued solvent. In April 1817 a transaction was entered into between him and the pursuer James, by which he granted an assignation to the latter, upon the narrative that 'he, 'as the only solvent partner of the said company of William Glen 'and Sons, at a general meeting of the creditors of the said Fal-'kirk Union Banking Company, held at Falkirk on Monday 7th 'April 1817, offered to take into his own hands, and uplift on 'his own account, the whole debts, bills, and obligations due to 'the said concern of William Glen and Sons, as a company of 'distillers at Mains, and, under the explanations after mentioned, 'to pay and discharge, within twelve months from the said 7th 'April 1817, the whole of the debts, bills, obligations, and en-'gagements of the said concern, and in fact all sums for which 'the said company was liable on any account; provided I, as 'trustee foresaid, should give him such assignation or authority 'to uplift and discharge the said debts, bills, and obligations, as 'should be considered necessary, with warrandice from fact and 'deed only.'

After further stating that James was, in consideration thereof, and of the trustee giving up all claim against the distillery company, to pay £5000, the deed proceeded in these terms:— 'Therefore I do hereby, as trustee, and with consent foresaid, 'in implement of my part of the agreement, assign, dispone, con-'vey, and make over to and in favour of the said James Glen, 'his heirs, executors, or assignees whomsoever, all and whole the 'whole debts, bills, and obligations of every description resting 'and owing by whatever person or persons to the said concern of 'William Glen and Sons, so far as I, as trustee foresaid, or the 'said William Glen and John Glen, are concerned, whether liqui-'dated by bill or obligation, or standing upon open account or 'otherwise, with the whole vouchers and instructions thereof, and 'all that has followed, or may be competent to follow thereon, for 'ever; surrogating and substituting the said James Glen in the 'full right of me as trustee foresaid, and of the said William 'Glen and John Glen, in the premises; with full power to the said 'James Glen to enter into the possession thereof, and to sue and 'prosecute for the same in his own name, and on his own ac-'count, and generally to do every thing thereanent which I 'could have done before granting these presents.'

Smith having raised an action against James for payment of

the £1000, the latter, founding on the above assignation, brought an action of reduction against him of the entry or transference in the books. This action he rested on the ground,

1. That the transfer had been made by their father, when insolvent, without any necessary cause, to Smith, a conjunct and confident person, and so was reducible under the statute 1621: And,

2. That having been made within sixty days from the father's bankruptcy, it was liable to be set aside on the statute 1696.

In defence it was maintained by Smith, that James had no title to pursue;

1. Because the assignation founded on merely conveyed to him the debts due to the distillery company, but did not contain any conveyance to a right of reduction on the above statutes, (which was personal to prior creditors only,) or to insist in any action relative to debts due by the company: And,

2. Because he was not a prior creditor of his father, and therefore, unless he had obtained a special assignation from those who were his creditors to set aside the transference, he could not insist in the process.

To this it was answered,

1. That the assignation conveyed to him the whole rights which the creditors had against the distillery company, and consequently also the right to vindicate any illegal transference by William Glen of his share of the funds: And,

2. That he had obtained, since the date of the action, a supplementary assignation, specifically conveying to him the right to reduce the transference.

The Lord Ordinary found, 'That the assignation founded 'on by the pursuer, as giving him a right to institute the pre-'sent process of reduction, does not afford a sufficient title for 'said action, and therefore sustained the objection to the title to 'pursue, and found him liable in expenses.' In a note his Lordship observed, that 'if the Lord Ordinary is right in holding 'that the original assignation did not convey the right of chal-'*lenging* the transfer of the £1000 to the defender, by which he 'became creditor, and not debtor, to the company of William 'Glen and Sons, it seems to follow that the supplementary assign-'ation will not support a summons which is not founded on it.' To this interlocutor the Court, on the report of Lord Probationer Corehouse, adhered.

LORD PROBATIONER.—The interlocutor of the Lord Ordinary is well founded, and the rationes assigned are satisfactory. The question here is similar to that which has arisen as to the right of a bankrupt who has settled under a sequestration with his creditors, and it has

been found, that unless he has a special assignation to the right of the creditors to reduce preferences, he cannot do so. That point was so decided by the case of M'Fie *v.* M'Gillivray, in which I was counsel, and which is correctly stated by Mr. Bell, vol. ii. p. 486. I am therefore of opinion, that the original assignation has bestowed on the pursuer no title to reduce this supposed preference. The supplementary assignation cannot avail the pursuer, because it is not the one on which the summons is founded, and is not calculated merely to cure a defect in the former assignation, but to convey a right not previously assigned.

The Judges unanimously concurred in this opinion.

J. Greig, W. S.—J. B. Watt,—Agents.

No. 8.

Robert Harvie, Suspender.—*Jeffrey—Napier.*
John Ferguson, Charger.—*Sol.-Gen. Hope—Wood.*

Jurisdiction.—Held competent for the Magistrates of a royal burgh to act as Judges in a question between their own tacksman of burgh dues, and a burgess relative to the payment of these dues.

Nov. 17. 1826.
1st Division.
Lord Eldin.
S.

The Town and Bridge Customs of the Burgh of Linlithgow are in the practice of being let by the Magistrates by public roup. In the month of October 1822 they were exposed to be let for the space of one year, from and after the 11th day of November 1822, when John Ferguson, shoemaker in Linlithgow, being the highest offerer, was preferred to the lease.

The articles of roup bore that the customs were 'to be levied 'according to use and wont.' After providing that the person to be preferred to the lease should, along with his cautioners, subscribe a minute enacting themselves, conjunctly and severally, to perform the conditions imposed upon the lessee, the articles of roup contain a clause imposing an obligation upon the Magistrates, conceived in the following terms:—'The Magistrates, or a quo-'rum of them, shall in said minute of enactment, along with the 'person or persons preferred to the let of the premises, and his 'or their cautioners, bind and oblige themselves, and the Council 'of said burgh, and their successors in their respective offices, to 'maintain the person or persons to be preferred to said let, and 'his or their cautioner or cautioners, in the possession of the pre-'mises to be let to him or them under those articles, during the 'period aforesaid, according to the terms of these articles, and 'use and wont.'

A minute of enactment was accordingly signed by John Ferguson and his cautioners on the one part, and by the Magistrates on the other, in terms of the articles of roup.

Ferguson, the tacksman, having entered upon his lease, claimed custom from Robert Harvie, a carter or carrier in Linlithgow, for goods carried by him belonging to unfreemen. Harvie objected to the demand, alleging that he was a burgess of the burgh, and as such was exempted from the payment of custom. Ferguson admitted that Harvie was not liable to pay custom for goods belonging to himself, or to any other burgess; but maintained that he was bound to pay custom for goods which he carried belonging to unfreemen, agreeably to the usage of the burgh. Harvie, on the other hand, contended that his privilege of burgess entitled him to carry goods to every person, whether a freeman or not, without paying custom, and that such was the usage of the burgh. The question upon the merits depended upon the fact, whether the usage was as alleged by the one party or the other.

Upon the first occasion, Ferguson detained Harvie's horse and cart, which were liberated upon the latter consigning the custom; but, in consequence of what occurred upon that occasion, instead of detaining Harvie's horse and cart in future, Ferguson kept an account of the carriages made by him for unfreemen, and afterwards brought an action against him for the amount before the Magistrates of the burgh.

Harvie declined the jurisdiction of the Magistrates, on the ground that in their official character they had a direct interest in the issue, in consequence of the obligation imposed upon them, under the clause above quoted from the articles of roup. He assigned as an additional reason of declinature, that as the case virtually involved a general question as to the liability or non-liability of all burgesses similarly situated with himself, the judgment to be pronounced would go to affect the amount of the customs, and consequently the rent to be obtained for them by the Magistrates in future years. He contended, that whatever jurisdiction the Magistrates might possess in ordinary questions arising between the tacksmen of the customs, and persons bringing goods into the burgh, they were incompetent to entertain the present case, the circumstances above mentioned being such, that were they to entertain it, they would in truth be judging in their own cause.

On the other hand, it was maintained on the part of the tacksman, that the jurisdiction of the Magistrates was perfectly competent: that the only question directly at issue was, whether the amount of customs concluded for was exigible by the pursuer from the defender—a question in the issue of which the Magistrates had no interest, because, in whatever way it should be

determined, it could not affect the amount of the tack-duty which the pursuer was bound to pay to them under his existing lease. It was further contended, that the clause above quoted from the articles of roup did not affect the question, as it merely bound the Magistrates to maintain the tacksman in possession of the customs, according to use and wont. As to the interest alleged to arise from the effect which the decision of the question might have on the rents to be obtained under future leases of the customs, it was said, if any such interest could be said to exist in the Magistrates at all, that besides being merely in their official capacity, and not as individuals, it was of that remote and indirect nature which neither law nor practice sustained as a good ground of declinature of their jurisdiction.

The Magistrates repelled the plea of declinature, and decerned against Harvie. A charge having been given to him, he brought a suspension, and relied mainly on his objection to the jurisdiction. The Lord Ordinary having suspended the letters simpliciter, Ferguson reclaimed; and the Court then appointed him to 'lodge a condescendence of what he avers and offers to prove 'respecting the practice in cases of this nature in the other burgh 'courts in Scotland,' and, on advising it with answers, (in which it was denied that there was any such practice,) directed the 'parties to prepare a joint Case, to be transmitted to the clerks of 'the several royal burghs in Scotland, for the purpose of ascertaining the general practice with respect to the jurisdiction asserted in 'the condescendence.' A joint Case (of which the above is a transcript) was accordingly sent to the clerks of the several royal burghs in Scotland, and they were requested to return answers to the following questions:—

1st, Whether or not the Magistrates of your burgh are and have been in the practice of judging generally in disputes which arise between the tacksmen of the customs, and persons bringing goods into the burgh?

2d, Whether the Magistrates of your burgh are and have been in the practice of judging in such cases as the present, where the party from whom the custom is claimed rests his defence, not merely on a denial of the facts out of which the tacksman's claim against him arises, or of the amount of the claim, but on a general plea of exemption from any claim in respect of the custom demanded? And,—

3d, Whether the Magistrates of your burgh are and have been in the practice of sustaining their jurisdiction in such cases as the present, when their jurisdiction has been declined?

Answers were accordingly returned, from which it appeared

that while it was the practice in 51 royal burghs to sustain their jurisdiction in such questions, in nine of them no such point had occurred, and that it was the practice in two only to refuse to judge in such matters, leaving them to the Sheriff. On advising these answers, the Court repelled the objection to the jurisdiction, and found the suspender liable in expenses.

LORD PRESIDENT.—The jurisdiction of almost every Court is founded on practice and consuetude; and we have it established by the most authentic evidence that the jurisdiction here objected to is exercised by almost every royal burgh in Scotland, and it appears from the statement of some of the clerks that this very question had been formerly decided. We must therefore alter the interlocutor, and repel the objection; and as the suspender pointedly denied the practice, he must be liable in expenses.

The other Judges concurred.

Suspender's Authorities.—Lethinton, March 17. 1755, (3418); E. of Kintore, Feb. 27. 1802, (7673); Robertson, Nov. 21. 1823, (ante, Vol. II. No. 498.)

Charger's Authorities.—1. Ersk. 2. 25; Dunbar, July 17. 1706, (3422); Napier, Nov. 24. 1821, (ante, Vol. I. No. 198); Thomson, Feb. 25. 1824, (ante, Vol. II. No. 675.)

G. and W. NAPIER, W. S.—INGLIS and WEIR, W. S.—Agents.

No. 9.

W. SPENCE, Suspender.—*Skene—Alison.*
A. ROSS, Charger.—*Moncreiff—Ivory.*

Right, Absolute or Revocable.—A father having sold a piece of land, and taken the purchaser bound to grant a bond in favour of himself in liferent, for his liferent use allenarly, and of his sons in fee, and having caused his sons to sign a postscript to the missive, agreeing not to call up the money for eight years certain; but no bond having been delivered on the one hand, or disposition on the other; held that the fee of the price was absolutely vested in the sons, and could not be revoked by the father.

Nov. 17. 1826.

2D DIVISION. Lord Mackenzie. M'K.

SPENCE, by a missive letter, offered to sell to Sir John Hope, for £2000, a piece of ground belonging to him, the price to be declared a burden on the lands, and to remain in Sir John's hands till the expiry of two years after Spence's death at interest on a bond to be granted to him in liferent, for his liferent use allenarly, and his sons, William and George, equally between them and their heirs, in fee. Before accepting this missive, Sir John stated his wish, that in order to make him certain of having the money in his hands for eight years, Spence's sons should sign an agreement at the end of the missive, giving their concurrence to this; and accordingly Spence procured his two.

sons to sign a postscript to the missive, written by himself, whereby they agreed 'that the above sum shall remain in Sir 'John Hope's hands, at least for eight years certain after Mar- 'tinmas next 1814.' Sir John then accepted the offer by a missive on his part, and a bond was executed by him, whereby he bound and obliged himself to make payment to Spence 'in 'liferent, for his liferent use only, and to the said William and 'George Spence equally between them, and to their respective 'heirs and assignees whomsoever, in fee, of the foresaid sum of '£2000,' agreeably to the terms of the missive; but neither it, nor any disposition of the property, was ever delivered. Sir John, however, entered into possession, and regularly paid the interest of the price. In 1819, one of the sons died without issue, and intestate; and the other son George having been sequestrated in 1824, Ross, the trustee on his estate, advertised for sale, as part of the bankrupt's property, the fee of this sum of £2000, under burden of the father's liferent. The latter thereupon brought a suspension and interdict, on the ground that he had not divested himself of the fee of the price of his property; and he pleaded,

1. That the bond on the one hand, and the disposition on the other, never having been delivered or put on record, there was no actual transference of the fee, but the rights of the two parties remained in the state of personal claims against each other; and although he might have compelled Sir John to deliver a bond in terms of the missive, this could not have been done by the sons, who were no parties to the transaction, and the stipulation in whose favour was entirely gratuitous: And,

2. That this being a gratuitous provision in favour of his sons, of the nature of a settlement, he might at any time have altered it by taking a bond from Sir John in different terms; that the circumstance of his obtaining their concurrence to the money remaining for eight years certain could not alter the nature of the right, which was a mere spes successionis, and amounted only to this, that if they did succeed, they would not call up the money till the expiry of the stipulated period.

The Lord Ordinary found the letters orderly proceeded, and stated in a note, as the ground of his judgment, that he considered 'the communication to the sons as of the strongest kind; for 'it not only made them acquainted with the conveyance in favour 'of the father in liferent allenarly, and of them in fee, but it 'required an actual and present exercise by them of the right 'vested in them under that conveyance, which exercise did take 'place accordingly. This seems far stronger than putting a 'conveyance on record.' The Court unanimously adhered.

Lord Gillies.—If matters had stood on the original footing of the missive as first sent to Sir John Hope, and the father had said nothing to his sons, a great deal might have been said in favour of the proposition that it still depended on the father's will, and that he might have agreed with Sir John Hope to alter the provisions in favour of the sons, though I have not particularly attended to that view, as the facts here are different. But he applied to the sons, and obtained their concurrence to the agreement with Sir John Hope; and it is of no consequence that no bond was delivered, as the missives effectually completed the obligation. No doubt, it was gratuitous on the father's part toward the sons; but he tells them of the provision made by him in their favour, without power of revocation, and causes them to become parties to the contract in agreeing to let the money lie with Sir John Hope for a number of years certain; and the missives thus completed establish the status of the whole parties as to this £2000, which the father has no power to alter, since he is no longer the sole party to the missive.

The other Judges concurred in this opinion, and in holding that the cases of Sommerville and of Miller, relative to the revocation of mortis causâ settlements, had no application to the present.

Suspender's Authorities.—Baird, Jan. 4. 1774, (7737); Symon, Nov. 20. 1765, (11679); Sommerville, May 18. 1819, (F. C.); Miller, July 11. 1826, (ante, Vol. IV. No. 429.)

Charger's Authorities.—1. Stair, 10. 5. and 7. 14; Fairlie, June 11. 1630, (11567); Trotters, Nov. 20. 1667, (11498); Borthwick, Jan. 20. 1686, (7735); Sinclair, June 26. 1707, (11572); Hamilton, Jan. 9. 1741, (11576); Riddell, Jan. 3. 1750, (11577); Leckie, Nov. 22. 1776, (F. C.); Turner's Creditors, Jan. 23. 1783, (11582.)

N. Grant,—Ritchie and Miller,—Agents.

J. Rowat, Pursuer.—*Baird.*
Dr. R. Whitehead, Defender.—*Skene—W. Bell.*

No. 10.

Judicial Remit.—After a remit of consent to a person of skill, the Court will not allow any other mode of proof, or remit of new to other persons; nor will they require the person to whom the remit has been made to reconsider his report, except on pointed and specific allegations of error, or where he has neglected to obey the directions of the remit.

Nov. 17. 1826.

2d Division. Lord Cringletie. B.

Rowat, a wright in Hamilton, having erected a large tenement of houses for Dr. Whitehead, without any estimate having been previously made, raised an action for payment of his account, in which he was met with the defence of overcharge, both as to the value and measurement of the work done. The Lord Ordinary, of consent of both parties, remitted to Mr. Wright, an archi-

tect in Edinburgh, with instructions to make certain investigations or inspections, and to report. A report was accordingly given in, to which Dr. Whitehead lodged objections of a vague and general nature, without specification of any error on the part of the architect, or any allegation that he had omitted to follow out the instructions of the remit. The Lord Ordinary having repelled these objections, Dr. Whitehead presented a reclaiming note, containing a prayer to sustain the objections, and remit of new to two other skilled persons to report; but the Court unanimously adhered.*

Lord Pitmilly.—After a remit of mutual consent to a man of skill, all that I conceive the Court can do, is to remit to the same person to reconsider his report; for I hold that such consent precludes parties from resorting to any other mode of probation, even on payment of previous expenses; and while in the Outer House, I always stated this to parties before nominating such a person. The only question here, therefore, is, whether such a case has been made out as to induce us to remit again to Mr. Wright to reconsider his report? And I do not think that there are any such specific objections, or allegation of omission of duty on the part of Mr. Wright, as to warrant this.

Lord Alloway was of the same opinion.

Lord Justice-Clerk.—I entirely concur in the general views which have been stated, and which I consider to have been sanctioned by the House of Lords, in regard to a report of Mr. Telford, in the case of Dixon *v.* the Monkland Canal Company.

Lord Glenlee concurred.

J. Singer, W. S.—Anderson and Whitehead, W. S.—Agents.

No. 11.

James Doeg, Pursuer.—*A. Wood.*
D. M'Donald and Others, Defenders.—*Stark.*

Nov. 18. 1826.
1st Division.
H.

Decree of cessio, in special circumstances, refused in hoc statu.
R. Paul, W. S.—G. I. Ure, W. S.—Agents.

No. 12.

A. Wilson, Pursuer.—*M'Neill.*
G. Miller, Defender.—*Ivory.*

Nov. 18. 1826.
1st Division.
S.

Decree of cessio refused in hoc statu.
J. M'Cracken,—J. Hamilton, W. S.—Agents.

* The Second Division, on this and several former occasions, disapproved of the practice of framing reclaiming notes in the form of a petition, and concluding with a prayer; and it was announced that in future a fine would be imposed, in the event of notes being lodged in such a form. The First Division, on the other hand, have objected to reclaiming notes which have not a prayer pointing out what is craved.

J. LANG, Raiser of Multiplepoinding.—*Pyper.* No. 13.
A. REID and J. MONACH, Claimants.—*Brown.*

Multiplepoinding.—Held,—1.—That the holder of a fund as trustee for creditors, having raised a multiplepoinding, and called certain parties as creditors of the common debtor, is not entitled to dispute their title to appear and object to his condescendence of funds;—and,—2. That he is not entitled to deduct from the sum to be consigned payments made to the debtor for aliment, without authority of the creditors.

Nov. 18. 1826.
2D DIVISION.
Lord Mackenzie.
F.

LANG, as trustee for the creditors of Allwood, held a property in Glasgow, for the purpose of selling it,—lodging the amount in a bank till the rights of the several creditors should be determined,—and thereafter dividing the fund among them. After drawing the rents for a few years, he sold the property, and brought a multiplepoinding as to the disposal of the price, in which he called Reid and Monach as creditors of Allwood. These persons subsequently gave in a claim, and objected to the condescendence lodged by Lang that it did not include the rents, and that it deducted from the price admitted to have been received, certain payments made by Lang to Allwood, without authority from the creditors.

To this it was answered,

1. That Reid and Monach had produced no evidence of their being creditors, and at all events that their debts would be found on inquiry to be extinguished, and therefore that they had no title to make the objections.

2. That the rents were not included in the summons, and therefore did not require to be condescended on: And,

3. That the payments to Allwood were for his subsistence.

The Lord Ordinary pronounced an interlocutor containing several findings, and ordering Lang to give in a condescendence of the price and rents agreeably thereto, without deduction of the sums paid to Allwood; and the Court, on a reclaiming note by Lang, adhered, so far as to find 'that the pursuer is bound to consign 'the price of the subjects sold, deducting only the expenses of the 'titles, and that with interest thereon, in terms of the trust-deed,' —'reserving to the defenders to bring an action for payment or 'consignation likewise of the rents of these subjects, and interest 'thereon, and to the pursuer his defences, as accords.'

The Court were of opinion that Lang having called Reid and Monach, could not object to their title to appear, their right to claim being the subject of discussion at a future stage; that the rents not being included in the summons, consignation of them could not be ordered; but that the whole balance of the price must be consigned, without deduction of sums paid by Lang without authority.

J. LANG, W. S.—J. and W. JOLLIE, W. S.—Agents.

No. 14.

W. WHITE, Pursuer.—*Cockburn—Rutherfurd.*
R. BALLANTYNE, Defender.—*Sol.-Gen. Hope—Anderson.*

Judgment of House of Lords, Construction of.—A party having made a deed of settlement, conveying his whole heritage, and particularly two pieces of land; and it having been found by the House of Lords, that although he was facile, yet he had a capacity to dispone, provided he were sufficiently informed as to the nature of the deed, but that he had not been so as to the lands; and having set aside the deed quoad the lands; held not competent to extend the judgment to other heritable subjects.

Nov. 21. 1826.

1ST DIVISION.
Lords Balgray, Cringletie, and Medwyn.
H.

WILLIAM WHITE, the nephew and heir at law of the late John Dalgleish, brought an action of reduction of a disposition and deed of settlement which Dalgleish had executed on the 3d of February 1808, and by which he conveyed to the defender Robert Ballantyne his whole heritable subjects; and further, and without prejudice to the general conveyance, 'all and whole these 'two pieces of land, the one lying in the Bridgelands of Peebles,' &c., 'and the other lying in the Kirklands of Peebles,' &c. Besides these two pieces of land, Dalgleish held an heritable bond over a house in Edinburgh, and a servitude of pasturage over the commonty of Cademuir.

In support of this action, White stated that Dalgleish had, from his earliest years, been afflicted with mental imbecility, and was unfit to manage his own affairs:—that he had been originally a herd, and had at one time obtained by means of his friends a farm, but was found to be unable from mental incapacity to attend to it:—that his brother, who was a clergyman, and was possessed of considerable property, became desirous that he should be placed in a situation where he might be properly attended to, and that accordingly he was boarded in the house of Ballantyne at Dryhope:—that, by the death of his brother the clergyman, John Dalgleish succeeded to the above subjects, and to personal funds, amounting in all to about £7000:—that while he was residing with the defender Ballantyne, a Mr. Cairns, who was a writer, was sent for to make out Dalgleish's deed of settlement, and that Dalgleish had given written instructions that the land should be conveyed to David Ballantyne, whereas the deed had been made out in favour of the defender Robert Ballantyne:—that as it was not agreeable to his intention, it could not be regarded as his deed of settlement; and as he must be thus held to have died intestate quoad hoc, the land fell to White as his heir at law. He therefore concluded that, the deed being reduced, the defender ought to be ordained 'to pay back to the pursuer 'the rents, mails, and duties of the lands thereby disponed, in so 'far as the same have been or may be intromitted with by him,

'as well as the annual rents of any heritable bonds or heritable 'property of any kind, to which he may have pretended to have 'acquired right, in consequence of the said disposition and as-'signation,' &c.

The instructions which were written by Cairns, in the course of a conversation with Dalgleish on the subject of his settlement, were in these terms:—'John Dalgleish appoints Mr. Ballantyne 'of Phaap his executor, burdened with his debts and funeral ex-'penses,—the land to Mr. David Ballantyne,—£100 to William 'White, baker, London;' and then there followed a number of legacies of the same amount to different parties, 'with £300 to 'Mr. David Ballantyne, besides the land.' Cairns then made out and extended the deed of settlement; but the land, instead of being conveyed to David Ballantyne, was disponed to the defender Robert.

In defence against this action it was stated, That although John Dalgleish was somewhat weak in his intellects, yet he was perfectly capable of making a valid deed:—that the reason why Cairns had not framed it according to the jotting was, that he had not the title-deeds at hand, nor more than one sheet of stamped paper, which would have been necessary, if a separate disposition of the lands had been executed:—that as the defender was nominated the executor, Cairns made out the deed generally in his favour, burdened with the legacies, and explained to John Dalgleish that he would take a back letter from the defender, binding him to convey the lands to David Ballantyne; and that accordingly, on the 17th September 1808, the defender addressed the following letter to John Dalgleish, and delivered it to Cairns:—'As I understand that by disposition and assigna-'tion, dated the 3d day of February 1808, granted by you to me as 'executor, with the burden of certain legacies therein mentioned, 'you also dispone to me all and whole these two pieces of land, 'the one lying in the Bridgelands of Peebles, and acquired by 'your brother, the late Dr. Dalgleish, from John Deans, and the 'other lying in the Kirklands of Peebles, and likewise acquired 'by him from John Baird, bounded and described as particularly 'mentioned in the title-deeds thereof; and as you declare that it 'was your intention to have disponed these two pieces of land to 'David Ballantyne, my brother, but which could not be properly 'done at the time for want of the title-deeds to give a particular 'description of the lands, I hereby bind and oblige myself and 'my heirs, if the disposition and assignation granted by you to 'me stands unaltered at your death, to grant to the said David 'Ballantyne, immediately on that event, a valid disposition to

'said two pieces of land, in order that your intentions may be 'fulfilled. I am,' &c. Lord Balgray, after allowing a proof, having reported the case, the Court, on advising informations, repelled the reasons of reduction, and assoilzied the defender.

White having appealed against this judgment, the House of Lords, on the 17th June 1817, ordered and adjudged, 'That it 'is established in this cause that John Dalgleish was of under-'standing and capacity sufficient to enable him to execute a set-'tlement of his property, if he should be duly and fully informed 'of the nature and effect thereof; and it is ordered that, with this 'declaration, the cause be remitted back to the Court of Session 'in Scotland to review the interlocutors complained of in the 'said appeal, having regard to all the circumstances of this case, 'and having more especial regard, as far as the Court's forms of 'proceedings will admit, to the facts and circumstances following, 'viz. To the fact that the jottings respecting John Dalgleish's 'settlement contain the following words:—'The land to Mr. "David Ballantyne,' and '£300 to Mr. David Ballantyne be-"sides the land;'—the fact that the settlement, nevertheless, con-'taining a disposition of £300 to David Ballantyne, contains no 'disposition of land to him;—the fact, that the reason given by 'Mr. James Cairns in his testimony why he made the disposition 'of the heritage general is, that he had not at that time by him 'John Dalgleish's title-deeds;—the fact, that the description of 'the two pieces of land described in the letter of September 1808, 'herein after mentioned, is, nevertheless, nearly in the very same 'words as those which contain the description of two pieces of 'land described in the settlement of February 1808;—the fact, 'that the settlement, the validity of which is in question in this 'cause, bears date on the 2d February 1808, by which lands, 'and those two pieces of land, are given not to David, but to 'Robert Ballantyne;—the fact, that the letter addressed by 'Robert to John Dalgleish, containing the obligation to grant 'the two pieces of land to David Ballantyne, does not bear date 'till September 1808, although the settlement bears date in Feb-'ruary 1808, being more than seven months after the date of 'the settlement;—to the circumstance, that it seems to be totally 'unexplained for what reason no such letter was written until 'the month of September, although the settlement was exe-'cuted in the previous month of February; and to the cir-'cumstance, that it does not seem to appear how far John Dal-'gleish was or was not informed of what would have been the 'effect of the settlement of the month of February, in case his 'death had happened before the month of September; and it is

'further ordered, that, after reviewing the said interlocutors, the 'said Court do and decern as to the Court shall seem meet.' In consequence of this remit, Lord Cringletie (before whom the case now came) appointed Ballantyne to give in a condescendence of what he averred, in explanation of the circumstances stated in the judgment of the House of Lords. In that condescendence he in substance gave the same statement as he had formerly done, which he offered to prove by the evidence of Cairns. On advising that condescendence, his Lordship reduced and decerned in terms of the libel.

Against this judgment the defender reclaimed, and the Court thereupon remitted to the Lord Ordinary to allow a re-examination of Cairns, and a proof of the condescendence by other witnesses. This having been done, his Lordship reported the case to the Court; and their Lordships, on the 26th of May 1819, 'having considered the whole cause, and having regard to the 'whole circumstances of the case, in terms of the remit from the 'House of Lords, and especially to the several circumstances 'specified in the said remit,' repelled the reasons of reduction, and assoilzied the defender.

White having again appealed, the House of Lords 'ordered 'and adjudged, that the said interlocutor complained of in the 'said appeal, so far as it repels all the reasons of reduction alleged 'by the appellant, and assoilzies the respondent from all the con-'clusions of the appellant's libel, and finds the appellant liable in 'the expenses of process, and all the directions consequent there-'upon, be, and the same is hereby reversed; and it is declared, 'that the disposition contained in the instrument under reduction, 'so far as it imports to dispose of any interest in the lands therein 'mentioned for the benefit of the respondent, his heirs and assignees, 'was contrary to the intention of the said John Dalgleish, as ex-'pressed in the jottings made by James Cairns, when he took in-'structions from the said John Dalgleish for preparing such in-'strument; and that the instrument, purporting to be a letter 'from the respondent, dated Dryhope, 17th September 1808, and 'signed Robert Ballantyne, cannot, under the circumstances, be 'deemed an instrument affecting the disposition of the said lands 'contained in the instrument under reduction; and that, there-'fore, such instrument under reduction, so far as the same im-'ports a disposition for the benefit of the respondent, his heirs and 'assignees, ought to be reduced, without prejudice to any ques-'tion with respect to the several charges imposed on such lands 'by the said instrument, in case the other property of the said 'John Dalgleish shall prove not to be sufficient to satisfy such

'charges; and therefore it is ordered and adjudged, that such 'instrument so under reduction be, and the same is hereby re- 'duced, so far as the same imports any disposition of a beneficial 'interest in the said lands to the respondent; without prejudice, 'nevertheless, to any question which may be raised with respect 'to the several charges imposed on such lands by the said instru- 'ment so under reduction, in case the other property of the said 'John Dalgleish, disposed of by such instrument, shall prove 'not to be sufficient to satisfy such charges; but that such bene- 'ficial interest (subject to such claim as aforesaid) ought to be 'considered as not disposed of by the said instrument, and as 'having therefore descended to the appellant, as heir of the said 'John Dalgleish, subject to any charges which may affect the 'said lands, independent of the disposition contained in the said 'instrument: And it is further ordered and adjudged, that the 'said cause be remitted back to the Court of Session in Scotland, 'to do therein as shall be consistent with this judgment, and as 'shall be just.' *

White then presented a petition to apply this judgment, and this having been done, and a remit made to Lord Medwyn to proceed in the case, he contended that he was entitled not merely to the two pieces of land, but also to the heritable bond and the servitude of pasturage which had belonged to Dalgleish, and fell under the general conveyance in favour of the defender. In support of this demand he maintained,

1. That as the defender had been assoilzied entirely in this Court, and the House of Lords had reversed that judgment, the deed of settlement had of necessity been set aside entirely; and therefore, as heir at law, he was entitled to the whole heritage which had belonged to Dalgleish.

2. That supposing the judgment of the House of Lords could not admit of this construction, still, as it had been thereby found that the deed of settlement did not contain the true expression of the will of Dalgleish, he must be considered to have died intestate, and therefore that his whole heritable subjects fell to the pursuer.

To this it was answered,

1. That the judgment of the House of Lords applied exclusively to the two pieces of land, and not to the servitude and heritable bond:—that there had been no total reversal, but merely a finding, that, in relation to the lands, Dalgleish had not been

* See 1. Shaw's Appeal Cases, p. 472.

sufficiently informed of the nature and effect of the deed of settlement:—that it having been finally decided that he was of sufficient capacity to make a deed of settlement, provided he were informed as to the effect of it, and the House of Lords having merely found that he was not so informed as to the lands, it was not competent to extend the judgment beyond these two specific subjects: And,

2. That there being no reversal to any greater extent than the lands, the decree of absolvitor must be held to remain in force quoad ultra, and therefore the pursuer could not insist for any thing more than the lands.

The Lord Ordinary found, 'That the judgment applies only 'to the two pieces of land in the Bridgelands and Kirklands spe- 'cially mentioned, which seemed to be the lands referred to in 'the said judgment, under the terms of 'the lands therein men- "tioned,'—'the said lands contained in the instrument under re- "duction;' more especially when taken in connexion with 'the "instrument purporting to be a letter from the respondent, dated "Dryhope, 17th September 1808;' and that it does not include 'the heritable subjects, which the pursuer now claims in virtue 'of the partial reduction of the deed in the defender's favour; 'and therefore that the pursuer is not entitled to any decerniture 'against the defender relative to these subjects.' To this interlocutor the Court, on advising Cases, adhered.

Lord Balgray.—When this case was originally before me, I was of opinion that Dalgleish was destitute of the power of making a settlement; but the Court held that the deed was good, and therefore they assoilzied the defender. The House of Lords have found, not that he was incapable of making a settlement, but that he was of sufficient capacity to do so, provided he were duly informed of the nature and effect of it. In applying this principle, however, they have found merely that he was not duly informed as to the effect of it relative to the two pieces of land, and quoad hoc they have reversed the judgment, so that the decree of absolvitor remains effectual quoad ultra. It is impossible, therefore, in construing the judgment of the House of Lords, to apply it to any other heritable subjects than these two pieces of land.

Lord President.—I am entirely of the same opinion. If the House of Lords had made use of the words 'heritable subjects' or 'heritage,' not only the lands, but the subjects now demanded would have been included. The judgment, however, is confined to lands, which cannot include an heritable bond and servitude. Suppose, for example, that a party disponed certain lands, mortis causâ, to one who was not his heir, without any mention of other heritable subjects, it is plain

that the conveyance would be held as limited to lands, and that the heir-at-law would take up the other heritable subjects. On the same principle, in construing this judgment, we cannot extend the words 'these lands' to the heritable bond and servitude.

LORD GILLIES.—I am of a different opinion. It appears to me, in the first place, that the judgment of the House of Lords must be considered as a total reversal of that pronounced by this Court; and it will be observed particularly, that there is no affirmance of it. In the second place, that judgment amounts to this, that the note of instructions is rather to be regarded as expressing the will of Dalgleish than the deed of settlement itself. By these instructions, no right whatever to heritable subjects is given to the defender; on the contrary, he is appointed executor, which is exclusive of the idea that he is to have right to the heritage. But if so, then the pursuer, as the heir-at-law, must have right to the heritable subjects which he now claims.

LORD CRAIGIE.—I concur in the opinion of the majority of the Court.

Defender's Authorities.—Scott, March 2. 1803, (No. 8. Ap. Tack); Geddes, Feb. 16. 1816, (F. C.)

W. DOUGLAS, W. S.—CRANSTOUN and ANDERSON, W. S.—Agents.

No. 15.

WILLIAM M'DONALD, Suspender and Pursuer.—*Jameson—Graham Bell.*

DAVID JACKSON and Others, Chargers and Defenders.—*Sol.-Gen. Hope—Marshall.*

Quinquennial Prescription.—Circumstances under which a plea founded on the quinquennial prescription was repelled.

Nov. 21. 1826.

1ST DIVISION. Lords Alloway and Eldin. S.

THE sole question in this case was, Whether certain claims for arrears of rent, made by M'Donald against the defenders, had been judicially stated in compensation of a claim by them in a process before the Sheriff of Perth, within five years from their removal from a farm of which they had been tenants? To constitute this claim, after decree had been pronounced against him in the above process, M'Donald brought an action against them for these arrears. In defence, they rested on the allegation that more than five years had elapsed from the time of their removal, and therefore that the claim was cut off by the quinquennial prescription. The Lord Ordinary having assoilzied them, M'Donald reclaimed, and the Court, on advising a condescendence, 'in regard to the period or periods of removal of David and 'Margaret Jackson, or their subtenant or subtenants, and also as 'to the period or periods when he first stated his claims for ar-

'rears of rent,' found that he had judicially demanded them before the Inferior Court within five years from the term of removal, and therefore repelled the plea of prescription, and remitted to the Lord Ordinary to proceed accordingly.

J. SMYTH, W. S.—LINNING and NIVEN, W. S.—Agents.

J. WIGHTMAN, Suspender.—*M'Gachen.* No. 16.
T. BONAR, Charger.—*W. Bell.*

RECLAIMING note against an interlocutor of the Lord Ordinary refusing a bill of suspension, refused in respect of no appearance by the party reclaiming.

Nov. 21. 1826.
2D DIVISION.
Bill-Chamber.
Lord Robertson.
F.

T. SMALL,—J. BROWN, W. S.—Agents.

A. M'ALLISTER, Suspender.—*Forbes.* No. 17.
R. GIFFIN, Charger.—*Marshall.*

INTERLOCUTOR refusing bill of suspension of a charge on a bill of exchange, adhered to.

Nov. 21. 1826.
2D DIVISION.
Bill-Chamber.
Lord Mackenzie.
B.

J. BROWN, W. S.—C. SPENCE,—Agents.

J. M'LEAN, Suspender.—*Skene—Neaves.* No. 18.
W. SIMSON, Charger.—*W. Bell.*

INTERLOCUTOR refusing bill of suspension of a judgment of the Sheriff of Argyll, adhered to.

Nov. 21. 1826.
2D DIVISION.
Bill-Chamber.
Lord Pitmilly.
B.

N. W. ROBERTSON,—J. MALCOLM,—Agents.

Sir HENRY STEWART, Pursuer. No. 19.
C. J. M'DONALD, Defender.—*Skene.*

Title to Pursue—Executor.—Probate of a will and letters of administration taken out from an English Prerogative Court by the survivor of three executors nominated in an English will, held a sufficient title to pursue in a Scotch Court, although the executor had no residuary interest under the will,—he always confirming before extract.

SIR HENRY STEWART, as survivor of three executors appointed by a will executed at Calcutta by the late Archibald Seton, having taken out a probate and letters of administration from the Prerogative Court of Canterbury, raised an action

Nov. 21. 1826.
2D DIVISION.
Lord Mackenzie.
M'K.

against M'Donald for the contents of a bill due to the deceased, and payable in Edinburgh. M'Donald pleaded as dilatory defences,

1. That as the executors appointed by Seton's will were not residuary legatees, but merely executors in trust for those having interest under the will, a probate obtained from an English Prerogative Court was not a sufficient title to pursue in Scotland: And,

2. That, at any rate, by the law of England, (as they averred,) the survivor of a number of executors was not entitled to take out a probate, unless there was an express devolution on the survivors, which was not the case here.

The Lord Ordinary repelled these dilatory defences, and found 'that the probate and letters of administration produced by the 'pursuer afford a sufficient title to pursue, the pursuer always, 'in case he shall be successful, confirming before extract;' and the Court, after hearing the counsel for M'Donald, unanimously refused a reclaiming note for him, but awarded no additional expenses, in respect that no appearance was made on the part of the pursuer.

The Court were agreed that the condition of confirming before extract afforded sufficient security to the defender, and that the title to pursue was settled by the cases of Wardlaw, June 21. 1715, (4500), and Clerk, Dec. 20. 1759, (4471), which had been referred to by the Lord Ordinary.

LOCKHART and SWAN, W. S.—H. MACQUEEN, W. S.—Agents.

No. 20.

Duke of HAMILTON, Suspender.—*Thomson—Fullerton.*
A. D. R. C. W. BAILLIE, Charger.—*D. of F. Moncreiff—Ivory.*

Entail—Superior and Vassal.—Bill of suspension passed as to the questions,—1.—Whether an heir of entail, succeeding in virtue of the forfeiture of a prior heir, is entitled to an entry as an heir, or as a singular successor; and,—2.—Whether, where the entail has been recognised by a former superior, to whom the present one has succeeded as an heir of entail, the latter can be affected by that acknowledgment.

Nov. 23. 1826.
1ST DIVISION.
Bill-Chamber.
Lord Craigie.

BY the entail of Lamington it is provided, that the whole heirs of tailzie 'shall keep, assume, bear, wear, and use the surname 'and arms and designation of Baillie of Lamington, without any 'alteration, as their own proper surname, arms, and designation 'in all time coming,' under the penalty of forfeiture, and that the next heir of tailzie should succeed as if the contravener were naturally dead. Of these lands the Duke of Hamilton was superior, and in 1774 a charter of resignation, containing the whole series of heirs of entail, was executed by Douglas Duke of Hamilton, in virtue of which titles were made up. The present Duke

possessed his estate, and the superiority of Lamington, as an heir of entail, and did not represent Duke Douglas in any other character.

On the death of Lady Ross Baillie, the last heir of entail in possession of Lamington, the estate ought to have descended to Sir Charles Augustus Ross of Balnagowan, who was her heir at law, and also the next heir of tailzie. There was, however, a similar clause in the entail of Balnagowan; and he having made his election of that estate, the charger, who was the next heir of tailzie after him, obtained decree of irritancy against Sir Charles, and finding that he was entitled to succeed to Lamington. He was then served heir of tailzie, and demanded an entry from the Duke of Hamilton in that character. The Duke did not object to give him an entry, but insisted that he should pay a year's rent as a singular successor, or that the claim should be reserved. This being refused, his Grace presented a bill of suspension, in support of which he maintained,

1. That the charger was not the heir at law of the late Lady Ross Baillie, the person last infeft, nor was he the next heir of the investiture, and therefore that he must be regarded as a singular successor, and so liable to pay a year's rent: And,

2. That although Duke Douglas had recognised the series of heirs contained in the entail, yet there was a reservation of 'his 'Grace's own right, and the right of all others, as accords;' and that, at all events, the suspender did not represent Duke Douglas, and could not be bound by any deed done by him injurious to the other heirs of entail.

To this it was answered, That the charger was the heir of the investiture; and as the entail had been recognised by the proper superior, in whose place the suspender stood, he was entitled to an entry in that character.

The Court, on the report of the Lord Ordinary, considering the question attended with much difficulty, and particularly as to whether the suspender could be affected by Duke Douglas's acknowledgment, passed the bill.

Charger's Authorities.—Lockhart, July 10. 1760, (15047); Mackenzie, July 4. 1777, (No. 2. Ap. Sup. and Vass.); Duke of Argyll, Nov. 18. 1795, (15068); 2. Ersk. 7. 7; Hill, Jan. 17. 1815; Sandford, 362.

R. Rutherford, W. S.—J. Thomson, W. S.—W. Forbes, W. S.—Agents.

No. 21. JANE SMITH, Advocator.—*Sol.-Gen. Hope—Baird.*
WALTER LOGAN, Respondent.—*Jameson—A. M'Neill.*

Proof—Account-Books.—Held that private books kept by a partner, containing, among numerous other entries, memoranda relative to the affairs of the company, but which it did not appear had ever been seen by the other partner, could not be admitted as evidence against the representatives of the one partner in an accounting at the instance of the executrix of the other.

Nov. 23. 1826.
1ST DIVISION.
Lords Alloway and Eldin.
D.

THE late John Maxwell and Archibald Smith were for several years partners as writers in Glasgow. No regular books were kept, and on the death of the partners, matters were found to be in much confusion, and disputes took place between their respective representatives. Miss Smith, as the executrix of Archibald Smith, then raised an action before the Sheriff of Lanarkshire against Walter Logan and others, the representatives of Maxwell, concluding for £765 : 13 : 9¼, as the balance due to Smith by Maxwell, both as a partner, and for advances of cash made on his private account. On the other hand, Logan and others brought an action of count and reckoning before the same Court against Miss Smith, concluding for £2000 as the balance due by Archibald Smith. A great deal of procedure ensued; but the chief question related to the admissibility of certain books which had been kept by Smith as evidence against the representatives of Maxwell. On the one hand, it was alleged by Miss Smith that these books belonged to the company, and that they contained several entries relative to the transactions of the company, and therefore must bear evidence in any question between the partners; while, on the other hand, the representatives of Maxwell stated that they were private books of Smith—that the entries were of a miscellaneous nature, and were plainly mere memoranda for Smith's own use, and therefore could not be admitted as evidence in favour of his executrix. The Sheriff, after allowing a proof as to their nature, found, 'That the account-'books produced are not sufficient of themselves to establish the 'articles therein contained, and are not sufficiently supported by 'the pursuer's proof,' and remitted to an accountant 'to make up 'a state of the accounts betwixt the parties upon the company 'books, and other evidence in process; in conformity, however, 'to the terms of this deliverance as to the account-books above 'mentioned.'

On advising a report by the accountant, the Sheriff assoilzied the representatives of Maxwell from the action at the instance of Miss Smith, and decerned for a balance in their favour. Of this judgment Miss Smith brought an advocation, in

which Lord Alloway found 'that there is no reason to suspect 'that the books kept by Mr. Smith had not been fairly kept 'by him in the office, and subject to the inspection of Mr. Max-'well whenever he chose to look at them;' and he remitted, before answer, to an 'accountant to prepare a report of the state of 'accounts betwixt the parties, in which he will give such credit 'to the books in question as he shall consider them entitled to.'

It having been afterwards explained that this was not to be considered as a judgment finding that the books were to be regarded as company books, the case was sent to the accountant, who reported that a large balance was due by Maxwell's representatives. This was chiefly supported by the above books; and Maxwell's representatives then objected to the report, and contended that as there was no evidence that they were company books, and as it appeared from inspection of them that they contained mere private jottings of Smith, they could not be founded on by his representatives as evidence in their favour to any effect.

Lord Eldin found, that 'the said books ought not to be re-'ceived as evidence in the accounting,' and remitted to the accountant to amend his report accordingly.

Against this judgment Miss Smith reclaimed; and the Court, on advising Cases, being satisfied that they could not be regarded as company books, adhered.

Lord Gillies.—I think the interlocutor is right—an opinion which I entertain, not as an accountant, but as a lawyer. The books are clearly proved to have been merely the private books of Smith; and the question is, whether he, if in life, or his representatives after his death, can found upon them as evidence in their favour to any effect. If they had been company books, I could not have concurred in the interlocutor, because such books afford evidence against all the partners, seeing that they are open to their inspection at all times. So far, indeed, is this principle carried in England, that it has there been decided that an entry made by the waiter of a club in the books of the club was to be considered public, and so binding on all the members. But the books in question are entirely private, and all the items which have been sustained rest on no other evidence.

Lord President.—I am of the same opinion. The books were plainly made up by Smith for a mere temporary purpose. Perhaps he intended that the entries should go into the company's books; but this was not done, and there is no evidence that Maxwell ever saw them.

Lord Balgray.—I also think the interlocutor right. The articles alleged to be proved by these books consist chiefly of lent cash, which can only be proved by the writ or oath of the borrower. The

question therefore is, whether these books, which are written by Smith, the alleged lender, are sufficient to prove the loan. It appears to me that they are mere loose memoranda—that there is no evidence that Maxwell ever saw them, or that they are of such a nature that he was bound to look at them; and therefore I think that we ought to adhere.

LORD CRAIGIE.—I am disposed to agree with Lord Alloway rather than with Lord Eldin. The books are entitled to some weight in the accounting, although not per se conclusive. It is true that a loan can be proved only by the writ of the borrower; but the advances here appear to have been made as inter socios, and not as proper loans.

HUNTER, CAMPBELL, and CATHCART, W. S.—D. BROWN, W. S.—Agents.

No. 22.

GEORGE MACKAY, Pursuer.—*Fullerton—G. G. Bell.*
D. MURRAY, Defender.—*Cockburn—Rutherfurd.*

Title to Pursue—Multiplepoinding—Res Judicata.—Circumstances in which it was held that a party founding on an unstamped and improbative document of debt alleged to have been obtained by fraud, and who had been called in a process of multiplepoinding, was entitled to pursue a reduction of a decree of preference in his absence, and that such decree did not form a res judicata.

Nov. 23. 1826.

2D DIVISION. Lord Mackenzie. F.

THE defender Murray having lent £880 to one Munro, received from him an unstamped improbative acknowledgment and obligation for repayment, with interest. This having come into the hands of Mackay, Murray's son-in-law, with a mandate indorsed on it, bearing to be signed by Murray, but not holograph, and ordering payment to be made to Mackay, the latter delivered it up to Munro, and obtained in return another unstamped improbative document, whereby Munro bound himself to pay the money to Mackay. Murray, however, having alleged that the original document had been fraudulently abstracted from his repositories, and his name forged to the indorsation, Munro brought a multiplepoinding, in which he called both parties, in order to ascertain to whom he should make payment. In this process a claim was lodged for Murray, but none was given in for Mackay, and decree of preference was accordingly obtained in favour of the former. Some time thereafter Mackay raised the present action of reduction of this decree as in absence, concluding also for repetition of the £880 from Murray, if paid by Munro; or for payment by the latter, if still in his hands.

To this action, besides his defences on the merits, Murray pleaded as dilatory defences,

1. That the decree in his favour formed a res judicata, and he alleged that appearance had been made by counsel for Mackay in the multiplepoinding.

2. That the missive from Munro, being unstamped and improbative, could not be founded on in a Court of Justice; and,

3. That the indorsation of the original document of debt, even if not challenged as false, was inept to transfer the right to it, seeing that such a debt could not pass by simple indorsation.

To this it was answered,

1. That the markings on the process proved that no appearance had been made by Mackay; and that although a decree in a multiplepoinding, in so far as regarded the raiser, was equally good as to those who did, and those who did not make appearance, yet, in so far as regarded the several claimants, a decree of preference in absence was exactly in the situation of any other decree in absence.

2. That the decree being thus liable to be opened up, parties were now in the same circumstances as if a claim had been originally lodged for the pursuer in the multiplepoinding, in which case his missive from Munro could not have been objected to by Murray as unstamped and improbative, seeing the document on which he himself founded was liable to the very same objection; and,

3. That although the indorsation might not have afforded a title to compel Munro to make payment, yet it was a sufficient warrant to authorize him to pay, which, indeed, the mere possession of the original document would have been; that, besides, as Munro had granted an obligation in consequence of it, and of the delivery of the original document, the transference was properly effected; and that, at all events, the pursuer had a sufficient title to pursue reduction of a decree pronounced in a process in which he had been called as a party.

The Lord Ordinary, with certain special findings, found 'it 'necessary for the defender to plead his other defences;' and the Court, while they recalled, in hoc statu, the findings in the Lord Ordinary's interlocutor, as going in some measure to decide points which were likewise involved in the defences on the merits, repelled the plea of res judicata, sustained the title to pursue, and remitted to the Lord Ordinary to proceed accordingly.

Low and Rutherford, W. S.—R. Roy, W. S.—Agents.

No. 23.

A. and J. HORSEFALL, Advocators.—*More.*
J. VIRTUE and COMPANY, Respondents.—*D. Macfarlane.*

Composition-Contract.—Held that, on a bankrupt failing to pay a composition under an extrajudicial contract, the original debt revives.

Nov. 24. 1826.
1st DIVISION.
Lord Eldin.
S.

VIRTUE and Company entered into an extrajudicial composition-contract with their creditors, by which they agreed to pay them 6s. 6d. per pound on their debts, at six, twelve, and eighteen months from the 1st of September 1821. A. and J. Horsefall were creditors for £500, and received three bills, each for £54. 3s. 4d., being the amount of the composition payable on their debt at the above dates. Virtue and Company retired two of the bills, but they failed to pay the third. That bill bore to be for 'a third 'and last instalment of 2s. 2d. per pound in a composition of 6s. 6d. 'in the pound on a debt of £500 sterling due to them (Horsefalls) 'by us, as guarantee for William Hilliard's intromissions with 'them to that extent in full.' Virtue and Company then granted a new bill to Horsefalls in these terms:—'Twenty days after date, 'we promise to pay Messrs J. and A. Horsefall, or order, at our 'warehouse here, £56. 8s. sterling, value received.' It was admitted that this bill was granted for the amount of the composition, with interest, for which the former one had been accepted. Virtue and Company having failed to pay this bill, and their estates having been sequestrated, Horsefalls lodged a claim for their original debt of £500, with interest thereon, under deduction of the two composition-bills which had been paid. This claim was received by the trustee, under a reservation of all objections to it. The sequestration was terminated by a composition-contract, by which Virtue and Company agreed to pay 2s. 4d. per pound on the debts due by them as a company, and 1d. per pound as individuals. Having objected, however, to pay a composition to Horsefalls on any larger sum than £56. 8s. at certain distant dates, they raised an action before the Sheriff of Edinburgh, concluding for payment 'of 'the sum of £52: 12: 6 sterling, in equal proportions, at the dates 'before mentioned, being the composition of 2s. 4d. sterling' on the sum of £451: 1: 8, and also for £1: 13: 2, as being the composition of 1d. per pound.

In defence against this action, Virtue and Company contended,

1. That by the extrajudical composition-contract the original debt was discharged, and that it could not be revived by their failure to pay the composition; and therefore that Horsefalls were only entitled to draw a composition of 2s. 4d. on the sum of £56. 8s., being the amount of the renewed bill; and,

2. That as Horsefalls had agreed to receive the second bill of

£56. 8s. in liquidation of the one for £54: 3: 4, a new and separate debt had been created; and as the latter bill had been completely innovated and discharged, the plea of the original debt reviving by a failure to pay the composition could not be maintained.

To this it was answered,

1. That the extrajudicial composition-contract was made on the implied condition, that if the composition was not duly paid, the original debt should revive; and that, by their failure to do so, Virtue and Company had violated the condition, and therefore Horsefalls were entitled to revert to their original debt; and,

2. That as it was admitted that the second bill had been received merely as an indulgence to Virtue and Company, and was for the amount of the composition, the circumstance of its being granted could not affect Horsefall's rights.

The Sheriff found 'that the pursuers, by delivering up, to 'the defenders the bill for the third instalment, and accepting 'the renewed bill, gave up any right which they had to claim 'the full amount of their original debt, on account of the third 'instalment not being paid in terms of the composition, and that 'they are entitled, in the last sequestration of the defenders, to 'claim only the composition on the amount of the debt in the bill 'for £56. 8s.;' and thereafter decerned for £8: 11: 11, as the amount of the composition.

Horsefalls having advocated, and restricted their claim to the effect of drawing full payment of the third instalment of the composition, the Lord Ordinary 'altered the interlocutors complained 'of, found that the complainers are entitled to rank for the amount 'of the debt originally due to them by the defenders, to the effect of 'drawing full payment of £54: 3: 4, being the third instalment 'of the composition agreed to have been paid to them, with in-'terest thereof, and decerned for payment accordingly, conform 'to the conclusions of the libel before the Sheriff, and found the 'defenders liable in expenses.'

To this interlocutor the Court, after hearing the counsel for Virtue and Company, and without calling on Horsefall's counsel to make any answer, adhered.

LORD PRESIDENT.—It seems to be contended that we have borrowed from the law of England the doctrine as to the original debt reviving. That is not the case: it is part of the law of mutual contract, by which, if the condition of paying the composition be violated, the original debt will revive. The rule under the bankrupt statute is different, in consequence of the words employed.

LORD BALGRAY.—The rule is consistent with common sense,—the composition being the quid pro quo.

LORD CRAIGIE.—I think that the advocators might have insisted to have it found that they were entitled to have been ranked for their full debt, under deduction of what payments they had received.

LORD PRESIDENT.—I think so too, and that the interlocutor does not express what is the rule at common law; but as they have not reclaimed, and are satisfied with the finding of the Lord Ordinary, we cannot alter the judgment to that effect.

Advocators' Authorities.—(1.)—2. Bell, 598, Alton, Nov. 22. 1705, (6710.)

Respondents' Authorities.—(1.)—1. Montague, 222, and Ap. p. 87.—(2.)—2. Ersk. 3. 92.

No. 24. Mrs. M'FARLANE or GRAHAM, Advocator.—*Cockburn—Donald.* DUKE of MONTROSE, Respondent.—*Sol.-Gen. Hope.*

Process—Advocation—Stat. 6. Geo. IV. c. 120. § 40.—A. S. 12th Nov. 1825, § 71.—Held,—1.—That fifteen days having elapsed from the date of an interlocutor in the Inferior Court, allowing a proof before a bill of advocation was presented, the bill was incompetent, although it was presented within fifteen days from the time a commission was granted for taking the proof;—and,—2.—That the limitation in point of time prescribed by the Act of Sederunt, 12th November 1825, as to presenting such bill, is not ultra vires of the Court.

Nov. 24. 1826.

1ST DIVISION. Bill-Chamber. Lord Medwyn. H.

THE Duke of Montrose raised an action of removing before the Sheriff of Stirlingshire against Mrs. M'Farlane, widow of Walter M'Farlane, tenant of the island of Inchcruin in Lochlomond, on the ground that the lease was expired. In defence she alleged that Mr. Watt, the factor of his Grace, had granted a prolongation of the lease, and that he was fully authorized so to do. This being denied, the Sheriff, on the 22d of May 1826, pronounced this interlocutor:—'Before answer, allows the defender, 'Mrs. Jane Elizabeth Graham, a proof of her averment that Mr. 'Watt had full power to grant leases, or to enter into agree-'ments to grant leases of the noble pursuer's farms; and allows 'the pursuer a conjunct probation thereanent; grants diligence 'at the instance of both parties against havers for recovering the 'factory or commission by the noble pursuer to Mr. Watt, and 'all other writings they may respectively consider necessary in 'support of their pleas, and commission to the clerk depute to 'take the depositions of the havers, and receive their exhibits, 'and assigns this day three weeks for reporting.' An examination of havers accordingly took place; but no commission having been granted for examining witnesses, the Sheriff, on an application to that effect, granted one on the 12th of October. Against these interlocutors a petition was presented, which was refused as incompetent on the 20th of October; and the term for reporting the proof was prorogated for fourteen days. Mrs. M'Farlane then

presented a bill of advocation on 24th October; and founding on the 40th section of 6th Geo. IV. c. 120, she prayed that the bill might be passed without discussion or caution, so that the proof might be taken in the Jury Court. Answers having been ordered, it was objected that as the interlocutor allowing a proof had been pronounced on the 26th of May, and as fifteen days had expired long before the presenting of the bill, it ought to be dismissed as incompetent, in terms of the 71st section of the Act of Sederunt of 12th November 1825. The Lord Ordinary accordingly refused it as incompetent, 'in respect that the 40th section 'of the Judicature Act, on which the advocation is founded, re-'quires the application to be made 'as soon as an order or inter-"locutor allowing a proof has been pronounced in the Inferior "Court,' and that the 71st section of the relative Act of Sede-'runt implies that the bill of advocation must be presented in 'such time that the passing of it may be intimated in the Inferior 'Court within fifteen days after the interlocutor, and in respect 'that the bill was only presented on the 24th ult., grounded on 'an interlocutor dated 26th May last.'

Mrs. M'Farlane then reclaimed, and contended,

1. That as it was impracticable to take the proof under the interlocutor of 26th May, seeing that no commission had been granted, and as an effectual order for proof had only been pronounced on the 12th of October, and the bill had been presented within fifteen days from that date, it was perfectly competent; and,

2. That as there was no limitation in the statute of any period within which such a bill might be presented, provided it was done before the proof was actually taken, it was not competent for the Court of Session, by their Act of Sederunt, to limit the privilege thereby bestowed.

The Court adhered.

The Judges were unanimously of opinion that the fifteen days were to be reckoned from the interlocutor allowing the proof; and that it was competent for the Court, in virtue of the powers conferred on them by the statute, to limit the period within which such a bill should be presented.

W. Mercer, W. S.—J. Dundas, W. S.—Agents.

No. 25. D. NAPIER, Suspender.—*Maitland—Shaw.*
J. LANG, Charger.—*Clephane.*

Nov. 24. 1826.
2D DIVISION.
Bill-Chamber.
Lords Medwyn and Cringletie.
F.

LORDS MEDWYN and CRINGLETIE successively refused bills of suspension presented by Napier of a charge on an interim decree for previous expenses awarded by the Sheriff of Lanarkshire in a cause depending before him, (since brought here by advocation,) on account of Napier's delay to state explicitly the defence on which he rested his cause. The Court adhered.

C. FISHER,—W. GUTHRIE,—Agents.

No. 26. Sir W. F. ELIOTT, Suspender.—*D. of F. Moncreiff—R. Bell.*
COCKS and COMPANY, Chargers.—*Baird.*

Game Debt—Bill of Exchange.—Bill of suspension passed to try question, whether the onerous holder of a bill of exchange is affectable by the circumstance of its having been granted in consideration of a game debt.

Nov. 24. 1826.
2D DIVISION.
Bill-Chamber.
Lord Robertson.
B.

THE Lord Ordinary refused a bill of suspension of a charge given by an indorsee to the acceptor of a bill of exchange granted in consideration of a game debt; but the Court, being of opinion that the early Scotch cases on this point had proceeded on an erroneous notion as to the practice of the English Courts, and that they could not be held to have settled the question, more especially as, in the later case of White's Trustee *v.* Johnston's Trustees, January 22. 1819,* (which was compromised before coming to a second judgment,) this Division of the Court had unanimously found that the objection of having been granted for a game debt applied to a bond in the hands of an onerous assignee, recalled the interlocutor, and remitted to pass the bill.

W. BELL, W. S.—FERRIE and FAIRLEY, W. S.—Agents.

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* The Reporters are enabled, by the kindness and courtesy of the Lord Justice-Clerk, to give the following report of the case here alluded to from his Lordship's note-book:—

'A large sum of money was lost by the late Sir J. L. Johnstone at play to Mr. 'Graham of Gartmore in October 1802, for which two bills of £1000 each, and a 'post obit bond, payable at the death of Sir W. Pulteney, for £8000, were granted 'by Sir J. Johnstone. Afterwards it appears that the post obit bond was cancelled, 'and a new bond granted for a small sum, making, with the bills, £3500; and that 'Mr. Graham, on Sir J. Johnstone's succeeding to Lady Bath, had renewed his de-'mand of payment, when the matter was referred to the Duke of Argyll, the Mar-'quis of Headfort, Lords Moira and Newark, as arbitrators. An award was pro-'nounced by them in May 1810, which led to Sir J. Johnstone's granting to Mr. 'Graham three bonds for £2000 each. Two of these bonds having been trans-

W. RAMSAY, Suspender.—*Donald.*
Dr. AITKEN, Charger.—*G. G. Bell.*

No. 27.

Previous Expenses.—A party having obtained a bill of suspension to be passed, and having expede letters thereon, but having allowed judgment finding the letters orderly proceeded to go out by default, must, on presenting a new bill, pay the expenses previously incurred.

RAMSAY having obtained a bill of suspension of a charge at the instance of Dr. Aitken to be passed by the Court without caution or consignation, expede his letters; but, having made no appearance at calling the cause, the letters were found orderly proceeded, and expenses awarded. For these expenses, and the sum contained in the original charge, Dr. Aitken again charged him, and he presented a new bill of suspension, which having been refused by Lord Cringletie, he presented a second. This was also refused by Lord Mackenzie; but, on a reclaiming note, the Court remitted to pass the bill on caution, and on payment of the expenses previously incurred, or (of consent of the charger) on caution for these being found.

Nov. 24. 1826.
2D DIVISION.
Bill-Chamber.
Lord Mackenzie.
F.

R. CAIRNS, Agent.

'ferred to Mr. White, formerly a shopkeeper in Edinburgh, for value said to have 'been advanced, but considerably under the amount of the bonds, a claim was 'made for payment on the trustees of Sir J. Johnstone. It appears also that in 'the lifetime of Sir John, on a demand of payment being made by Mr. Graham 'as to one of the bonds, Mr. Ure, one of the trustees, wrote that he had authority 'from Sir J. Johnstone, and would admit it as a debt under the trust, if it was not 'publicly exposed to sale. But Sir J. Johnstone having died, his trustees raised 'the present action for reducing and declaring void the bond, and also the letter 'of Mr. Ure, as being in violation of the act of Queen Anne.

'The Lord Ordinary pronounced an interlocutor, sustaining the reasons of re-'duction, against which the petitioner, as trustee for the creditors of White, has com-'plained; and he contends that the statute does not reach the bonds in question, 'which were granted in consequence of the award, after the game debt had been 'done away—that, at any rate, it could not attach to him, who acquired *bonâ fide* '—and that Mr. Ure's letter bars the trustees from any such objection.

'*Opinion.*—I thought it right that answers should be ordered, that we might see 'the respondent's account of these transactions; but I am now satisfied that the in-'terlocutor is right.

'The words of the act are few and precise, and reach all documents or obliga-'tions for game debts, into whatever hands they pass, even *bonâ fide* holders. See 'this incidentally laid down by Lord Mansfield, 2. Douglas, page 636. His words 'are, in speaking of notes and bills,—'The law is settled, that a holder coming "fairly by a bill or note has nothing to do with the transaction between the ori-"ginal parties, unless perhaps in the single case (which is a hard one, but has 'been determined) of a bond for money won at play;' and here, notwithstanding the 'proceedings that are detailed as covering up the transaction, we must hold that 'the bonds in question had reference to money lost at play. And I am not at all

No. 28. J. M'CRONE, Suspender.—*Jeffrey.—Christison.*
D. CAMPBELL, Respondent.—*Cuninghame.*

Church Seat—Interdict.—Circumstances in which a bill of suspension and interdict against occupying a seat in church passed.

Nov. 24. 1826.
2D DIVISION. Bill-Chamber. Lord Pitmilly. M'K.

M'CRONE, the proprietor of a feu on the estate of Holmhead in the parish of Cathcart, 'together with a proportion of any area 'in the church of Cathcart effeiring to the lands hereby disponed,' about 18 years ago erected and enclosed a pew in the church, and had, by himself or tenants, been in use to occupy it. Campbell, who, it was alleged, was tenant of a mill and some lands, also held feu of the same estate of Holmhead, and had at one time commenced sitting in this seat while a tenant in M'Crone's feu, having continued to occupy it jointly with M'Crone, the latter, in the course of last autumn, wrote to Campbell that he intended to put a lock on the seat, with a view to exclude him, in order that Campbell might, if he saw cause, take legal steps to prevent this being done. Campbell did not resort to such measures; but as soon as M'Crone had put the lock on the seat, he broke it open, and took forcible possession. Thereupon M'Crone presented a bill of suspension and interdict to have Campbell prohibited from taking possession of and using the seat. The Lord Ordinary passed the bill, and likewise granted the interdict; and the Court adhered.

LORD GLENLEE.—The interlocutor is right. After the letter giving notice of the intention to put on a lock, that he might take legal measures, Campbell had no right violently to intrude, and he ought to be interdicted. I do not say, that if any one puts up an obstruc-

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'clear that the acquisition at so great an undervalue is not sufficient to show that 'the petitioner White knew their origin. I do not think he can plume himself on 'bona fides. I was at first moved by the terms of Mr. Ure's letter; but as any such 'promise, even by the granter, would have been no bar to an after challenge on 'the statute, I cannot consider it as precluding the pursuers from reducing the 'bonds.

'*Lord Glenlee.*—The interlocutor is quite right.

'*Lord Robertson.*—I wished for an answer, to have it ascertained if the evidence 'was sufficient. I am now satisfied this was a game debt; and there is a *vitium* 'reale quod inhæret ossibus, and it is declared void by the statute. Whether there 'is *bona fides* or not, I do not give much credit to it here; but, at any rate, that 'will not avail. As to Ure's letter, it would not avail any thing more than Sir J. 'Johnstone's.

'*Lord Bannatyne* concurs in opinions delivered.

'*Lord Craigie* equally clear for adhering.

'Unanimously adhere, with expenses.'

tion without notice, parties disturbed by it may not knock it down brevi manu; but that is not the case here, and besides, the possession seems to have been in favour of M'Crone.

Lords Justice-Clerk and Pitmilly concurred.

Lord Alloway.—I likewise concur in the interlocutor; but I would go chiefly on the seat having been erected by M'Crone.

W. Renny, W. S.—J. Baird, W. S.—Agents.

David Paterson, Suspender.—*Currie.*
A. Mitchell, Charger.—*Sol.-Gen. Hope.*

No. 29.

Forgery.—A bill of suspension passed simpliciter of a charge on a bill which the Court was satisfied from inspection was forged.

Paterson presented a bill of suspension of a charge as indorser on a bill, alleging that his name was forged. The Lord Ordinary refused it, 'in respect that this bill is founded on an allegation of forgery, which is quite general, and unaccompanied 'by any statement which can give it plausibility, and that it is 'offered without caution, and that the suspender does not produce 'any subscriptions by himself, stated to be genuine, which would 'admit of a remit to engravers.' Paterson having reclaimed, and produced genuine signatures, the Court, on comparing them with the indorsation, and being satisfied that it was a forgery, passed the bill without caution or consignation.

Nov. 25. 1826.
1st Division.
Bill-Chamber.
Lord Medwyn.
S.

A. Goldie, W. S.—R. Burnett, W. S.—Agents.

J. Dickson, Suspender.—*Maidment.*
A. Dickson, Charger.—*Jameson.*

No. 30.

Decree in Foro—Compensation.—Circumstances under which a plea of compensation against a charge on a decree in foro for expenses was repelled.

James Dickson presented a bill of suspension of a charge on a decree of the Court of Session for £82 of expenses, which had been obtained in foro. In support of it he alleged that, in the process in which the decree had been obtained, he had unsuccessfully attempted to show that certain advances to the charger had been made by him as a partner; but that, as the Court had found that there was no partnership, he was entitled to repayment of these advances, and to set them off against the claim for expenses. The Lord Ordinary refused the bill, 'in respect that this bill of 'suspension of a decree in foro is offered without caution, and 'that the reason of suspension as to the sum charged for having

Nov. 25. 1826.
1st Division.
Bill-Chamber.
Lords Craigie and Medwyn.
H.

'already been paid, is founded on an alleged claim of a sum pre-'viously paid on another ground altogether, and which payment 'the suspender says he ought not to have made.' To this interlocutor the Court adhered, both for the reasons there stated, and that the counter claim appeared to be unfounded.

J. J. FRASER, W. S.—A. GREIG, W. S.—Agents.

No. 31.

E. ANDERSON, Suspender.—*Alison.*
H. M. Low, Charger.—*Jameson.*

Bill-Chamber—Expenses.—Circumstances under which a first bill of suspension having been refused, and expenses found due, and a second bill being passed, the Court refused to recall the finding of expenses relative to the first bill.

Nov. 28. 1826.
1ST DIVISION.
Bill-Chamber.
Lords Alloway and Eldin.

ANDERSON having been incarcerated, as in meditatione fugæ, in January 1826, presented in August thereafter a bill of suspension and liberation, which was refused by Lord Alloway, and expenses were found due on the 25th of that month. He then presented a second bill, which was passed by Lord Eldin on the 20th of September. On the 15th of November he reclaimed to the Court against the interlocutor of Lord Alloway finding expenses due, and praying to have the bill passed, to the effect that all questions of expenses might be discussed on the expede letters.

To this it was answered,

1. That the interlocutor of Lord Alloway was final, no reclaimer having been presented within the requisite period; and,

2. That the grounds stated in the second bill of suspension were different from those pleaded in the first, and therefore that the suspender was properly found liable in expenses.

The Court refused the reclaiming note.

Observed, that it did not necessarily follow, that because a second bill had been passed, expenses were not justly due in relation to a previous one which had been refused.

G. LYON, W. S.—LOW and RUTHERFORD, W. S.—Agents.

JOHN STARK, Advocator.—*Jeffrey—Cuninghame.* No. 32.
Sir A. EDMONSTONE, Respondent.—*D. of F. Moncreiff—Connell.*

Landlord and Tenant.—Circumstances under which it was held that a tenant, having followed the course of cultivation pointed out in his lease, was not liable in damages for an alleged deterioration of the lands, arising from the rules of good husbandry not having been observed.

Nov. 28. 1826.
1ST DIVISION.
Lord Eldin.

IN 1805 Stark obtained a lease for 19 years of a farm belonging to Sir Archibald Edmonstone, at a rent of £95. By the tack the following stipulation was made in relation to the cultivation of the farm:—'And further, the said John Stark binds and 'obliges himself to labour, manure, and manage the lands hereby 'let in such a manner as the same may not be hurt by undue 'labour, and in no wise to waste or deteriorate the lands, but, on 'the contrary, to use all proper means for meliorating and im-'proving them; and particularly the said John Stark binds and 'obliges himself and his foresaids to manage, cultivate, and 'labour the lands hereby set, according to the rules of good hus-'bandry for that part of the country and such a farm; that is to 'say, one third part of the arable lands to be at all times in grass, 'and one twelfth part at least in fallow, potatoes, or turnip. Three 'white crops are never to follow one another without the inter-'vention of fallow, turnip, tares, cabbages, potatoes, clover, or 'black crop—that is, peas or beans, or both. Wheat is never to 'be sown oftener than once in four years on the same spot. If a 'white crop follows a black crop, the land to be in fallow or tur-'nip the subsequent year, and grass seeds must be sown with 'the white crop which immediately follows fallow or turnips. 'And the said John Stark binds and obliges himself and his 'foresaids to consume all the straw of the farm upon the farm; 'as also to lay upon the farm yearly all the dung which may be 'produced from it during the continuance hereof, and to leave 'his last year's dung thereon, for the use of Sir Archibald Ed-'monstone, Bart., or his incoming tenant, upon being paid the 'value of the same, according to the determination of two neutral 'men to be mutually chosen. The said Sir Archibald Edmonstone 'and his foresaids, or the incoming etnant, shall have liberty to 'sow grass seeds with any part of the waygoing crop they shall 'think proper, to the extent of five acres lying contiguous; the 'said John Stark and his foresaids being bound to harrow in the 'same along with their own seed, without receiving any allowance 'on that account, and also to hain the said sown grass from the 'separation of the crop.' Founding on the above stipulation, Sir

Archibald Edmonstone, early in 1824, presented a petition to the Sheriff of Stirlingshire, stating 'that the said John Stark has 'already hurt the said lands by undue labour, and is not manur- 'ing or managing the same according to the rules of good hus- 'bandry of that part of the country; on the contrary, is wasting 'and deteriorating the same. Particularly he has begun to plough 'the park at the top of the wood on the same farm, which, ac- 'cording to his tack, and the rules of good husbandry, ought 'not to be broken up this year; and in general is not using a 'park in the whole farm agreeably to the said rules; and he is 'leaving tops of hillocks unploughed, and using improper means 'to scourge and impoverish the farm.' He therefore prayed for a remit to 'persons of skill to visit and inspect the whole of the 'said farm, this being the last year of his possession, and to re- 'port their opinion as to the present state and condition thereof, 'and what parts of it ought to be sown and laboured this season, 'agreeably to the rules of the tack, and those of good husbandry 'in that part of the country in such a farm.' The Sheriff remitted to farmers 'to visit and inspect the farm in question, and 'to report in terms of the prayer of the complaint, and, in par- 'ticular, whether the park at the top of the wood ought to be 'ploughed or laboured this season; and if the lands are deterior- 'ated, to what extent.' These persons reported, that in general Stark had his farm laid down during 1822, 1823, and 1824, in the terms prescribed by the tack;—that, however, they were 'of opi- 'nion that the park at the top of the wood ought not to be 'ploughed this season, and that on that account he ought to be 'found liable in £10 of damages;'—that 'the farm in general 'has been deteriorated by the mismanagement of the tenant,'—(but in what particular respect they did not specify);—that on this account £25 ought to be awarded;—that Sir Archibald Edmonstone should be allowed to sow grass seeds amongst the corn crop; and that certain other things would be advantageous to the farm.

The Sheriff having, in respect of the report, found Stark liable in £35 of damages, he brought an advocation, in which he contended, That although there was a stipulation in the tack that the farm should be cultivated according to the rules of good husbandry, yet certain specific rules had been prescribed, explanatory of these general terms; and as the reporters did not state that he had deviated from these rules, and as Sir Archibald Edmonstone had at all times an opportunity, either by himself or his factor, of checking any improper deviation from them during the currency of the lease, and as no complaint of mismanagement

had been made till the expiration of the lease, when it was brought forward only in vague and general terms, he ought not to be subjected in damages.

To this it was answered, That the stipulation which required that the rules of good husbandry should be followed, and that the lands should not be wasted or deteriorated, was independent of the specific provision as to the course of cultivation; that the fact, whether the lands had been deteriorated or not, was to be ascertained by neutral men; and that as it had been found that they had been deteriorated, and that one park ought not to have been ploughed, the judgment of the Sheriff was correct.

The Lord Ordinary advocated the cause, altered the interlocutors, assoilzied Stark, and found him entitled to expenses; and the Court adhered.

The Judges appeared to be satisfied that Stark had, in the cultivation of his farm, followed the course which had been prescribed to him; and that having done so, he could not be liable in damages for any deterioration thence arising.

Respondent's Authorities.—Murray's Trustees, Feb. 26. 1806, (No. 12. App. Tack); Thomson's Repts. Nov. 12. 1824, (ante, Vol. III. No. 202.)

J. Dickie, W. S.—J. and W. Ferrier, W. S.—Agents.

Mrs. M'Neill or Jollie, and A. Clason, W. S. Pursuers.—*D. of F. Moncreiff—Rutherfurd.*
W. Moir, Defender.—*Wilson.*

No. 33.

Cautioner—Relief.—Circumstances under which it was held that a principal debtor was bound to relieve his cautioner, without abiding the discussion of certain alleged counter claims.

Nov. 28. 1826.
1st Division.
Lord Eldin.
S.

The pursuers brought an action of relief against the defender, concluding that he should be ordained to relieve Mrs. Jollie of a cautionary obligation contracted on his behalf by her father, and in security of which a bond had been granted over her estate. In defence, he alleged that he had considerable counter claims; and the Lord Ordinary appointed him to lodge a state of his accounts. Having failed to do so, after repeated orders for production of them, the Lord Ordinary decerned in terms of the libel, and the Court adhered.

J. Smyth, W. S.—P. Graham, W. S.—Agents.

No. 34. T. CARGILL, Pursuer.—*D. Dickson.*
J. BAXTER, Defender.—*D. of F. Moncreiff—J. Henderson jun.*

Process — Summons.—A party having raised, and for a considerable period insisted in an action of count and reckoning and damages; held competent for him to raise a supplementary summons on exactly the same narrative of facts, but concluding for damages for certain acts, which, though narrated in the former summons, did not form the ground of the conclusion for damages.

Nov. 28. 1826.
2D DIVISION.
Lord Glenlee.
F.

IN 1813, Cargill, who had been tenant of a farm of Baxter's, raised a summons against the latter, narrating a series of alleged oppressive and injurious proceedings on the part of the landlord, and, inter alia, certain proceedings in regard to the management and sale of his stock and cropping under a process of sequestration, and concluding for count and reckoning, and for damages on the ground of an alleged illegal interdict and ejection; but not concluding for any damages in respect of the landlord's conduct regarding the sale and management of the crop. The action, however, went on, as if there had been such a conclusion, till 1820, when the defect was pointed out by the defender. A supplementary summons was then raised, which, narrating the same facts as those in the original summons, concluded for damages on the ground above mentioned. The Lord Ordinary, having disposed of most of the conclusions of the original summons, reported the supplementary action on informations, with the condescendences and answers as to the grounds of damage.

The Court found that the supplementary summons was competent, and remitted the cause to the Jury Court.

R. URQUHART,—C. F. DAVIDSON, W. S.—Agents.

No. 35. W. JEFFREY, (ANDERSON'S Trustee,) Pursuer.—*Brodie.*
J. and J. M'GREGOR, Defenders.—*Clephane.*

Process, Foreign.—Party reponed against decree of Lord Ordinary, proceeding on failure to obtemper an order for the production of the original proceedings in a foreign Court, in respect these proceedings were now produced; and Observed, that no Court was entitled to demand production of the records of a foreign Court.

Nov. 28. 1826.
2D DIVISION.
Ld. Cringletie.
B.

IN an action founded on a decree of the Court of Hamburgh, the legitimate or extract of which was produced at the commencement of the action, the Lord Ordinary appointed Jeffrey, the pursuer, to produce the original proceedings before that Court, and, after the lapse of a prorogated period, 'in respect the decreet founded on 'has not been produced,' dismissed the action. Against this in-

terlocutor Jeffrey reclaimed, and before the cause came to be heard, he obtained and produced the original proceedings in the Court of Hamburgh. The Court thereupon remitted to the Lord Ordinary to recall his interlocutor, receive the productions, and proceed accordingly, reserving to him to decide all claims of expenses.

LORD ALLOWAY observed, that the order by the Lord Ordinary to produce the original proceedings ought not to have been made, as no foreign Court had a right to demand that another should part with its record.

W. and A. G. ELLIS, W. S.—CAMPBELL and MACK, W. S.—Agents.

W. ANDERSON, Pursuer.—*Jardine.*
W. SOMMERS, Defender.—*Murray—Currie.*

No. 36.

L. O. assoilzied with expenses. Court adhered.

Nov. 28. 1826.

2D DIVISION.
Ld. Mackenzie.
B.

LYON and CHILD, W. S.—J. L. MITCHELL,—Agents.

Mrs. GRAHAM, Pursuer.—*Cuninghame.*
K. M'ARTHUR, Defender, and A. JOHNSTON, W. S. his Agent.
—*Brownlee.*

No. 37.

Agent and Client—Writer's Hypothec.—Agent in a cause for a party in whose favour expenses have been awarded, not entitled to object to deduction of a sum of expenses in which his client had been found liable at a previous stage of the proceedings.

IN an action at the instance of Mrs. Graham against M'Arthur, a sum of expenses was, in 1819, awarded to the former, for which decree was allowed to go out in name of Mr. Dickson, her agent. The decree, however, was never extracted, and at a subsequent period, Mrs. Graham having been found liable in certain expenses, Dickson renounced his claim to those formerly awarded her, and for which decree had been allowed to be taken in his name, and she thereupon claimed to be allowed to set off against the expenses in which she was now found liable, those formerly awarded her. This was opposed by Mr. Johnston, M'Arthur's agent, who contended that he was entitled to decree in his own name for the expenses found due to his client, and that Mrs. Graham could not defeat his right by setting off those awarded to her many years before, which had thus come into the situation of any other private debt between her and M'Arthur; and that the cases of Stothart *v.* Johnston's Trustees in the Jury Court,

Nov. 28. 1826.

2D DIVISION.
Lord Mackenzie.
M'K.

and of Warburton *v.* Hamilton, did not apply to the present, as in both these the expenses allowed to compensate each other were awarded unico contextu, and arose out of the same verdict or judgment. The Lord Ordinary admitted the renunciation by Mr. Dickson, and found 'that the expenses to which Mrs. Margaret 'Graham was formerly found entitled in this process, must be 'deducted from the expenses to which she has now been found 'liable, before decreet can be allowed to go out in name of Mr. 'Johnston, the agent for Robert M'Arthur, for the latter ex-'penses.' The Court unanimously adhered.

LORD JUSTICE-CLERK.—I cannot make any distinction between this case and the two founded on by Mrs. Graham; though, if the decree in Mr. Dickson's name had been extracted, it might have been different.

LORD GLENLEE.—I have no idea that the agent in a cause is in any better situation than the principal party, barring extrinsic claims of compensation.

LORDS PITMILLY and ALLOWAY concurred.

Mr. Johnston's Authorities.—Stothart *v.* Johnston's Trustees, Dec. 3. 1822, (2. Murray's Rep. 549); Warburton, May 30. 1826, (ante, Vol. IV. No. 393.)

W. DICKSON, W. S.—A. JOHNSTON, W. S.—Agents.

No. 38. J. MURRAY and Others, Pursuers.—*Jameson—A. Murray jun.*
J. T. THOMSON, Defender.—*Sol.-Gen. Hope—Small Keir.*

Nov. 29. 1826.
1ST DIVISION.
Lord Eldin.
8.

THIS was a special case, in which the Lord Ordinary decerned against the defender for expenses from a certain date; and the Court adhered.

CUNINGHAM and BELL, W. S.—J. YOUNG, W. S.—Agents.

No. 39. BAZETT, FARQUHAR, CRAWFORD, and COMPANY, Pursuers.—*Skene—H. J. Robertson.*
HEUGH'S TRUSTEES, Defenders.—*Sol.-Gen. Hope—J. Millar.*

Executor—Decree of Constitution.—Held that a legatee is entitled to decree constituting his legacy against the executors or trustees of the testator, although it be provided by the will that, in the event of an insufficiency of funds, the legacies shall suffer a pro rata diminution, and it has not been ascertained whether there will be sufficient funds.

Nov. 29. 1826.
1ST DIVISION.
Lord Meadowbank.
D.

THE late John Heugh, by a trust-deed of settlement, bequeathed a legacy of £1700 to each of his sons and daughters, one of whom was Andrew Heugh, who resided at Calcutta; 'payable the said 'legacies at the first term of Whitsunday or Martinmas hap-

'pening 12 months after my decease, with interest thereon there-
'after: It being hereby declared, that if I shall have previously
'advanced any sums to or on account of my said children, or
'either of them, and shall not have debited them therewith in any
'book or ledger, that then and in that event such sums shall not
'be understood to form a part of their provisions under this set-
'tlement; but where I shall have debited them with such advances
'in my said book or ledger, the amount of the same, and interest
'thereon from the time of such advance, shall be held and under-
'stood as payment of a part of their said legacies, and be deducted
'by my said trustees from the amount thereof at settling the
'same: And also declaring, that in the event of the death of any
'of my said children without lawful issue of their bodies, that
'then and in that event the legacy above destined to such de-
'ceasers shall fall to and be equally divided among my sur-
'viving children, including the said John Heugh, and the heirs
'of the body of predeceasers, such heirs being only entitled to
'the share which would have fallen to their parents, if alive: And
'also declaring, that in the event (from any unforeseen cause)
'of my said estate and effects before conveyed falling short of
'being sufficient for the payment of the said legacies to my said
'children, and satisfying the other purposes foresaid of this trust,
'that then and in that case such deficiency shall be borne equally
'by my said younger children out of the legacies, before destined
'to them.'

Andrew Heugh having died, leaving a will nominating executors, the pursuers, as their attornies, brought an action against the trustees, concluding for decree of constitution against them. In defence, the trustees did not deny that there were sufficient funds to pay the legacies; but pleaded that as they had not been able to realize them, and as it might eventually turn out that they would not be sufficient to pay all the legacies, and as it was provided by the trust-deed that in that event each of the legacies should suffer a pro rata diminution, decree ought not to be pronounced in the mean while. The Lord Ordinary 'ordained the defend-
'ers, the trustees of John Heugh the testator, to give in a state
'of their accounts, accompanied with the vouchers; but in respect
'the trust-deed contains a clause, providing that in case of de-
'falcation of funds to pay all the legacies in full, each shall suffer
'a pro rata diminution, refused, in hoc statu, to pronounce decree
'of constitution for the legacy now sued for against the said de-
'fenders, and recommended to the parties to bring all the lega-
'tees, and others interested in the trust-funds, into the field by a
'process of multiplepoinding, to be remitted to and conjoined

'with the present process, reserving all questions of expenses. The pursuers then reclaimed, and contended that they were entitled to immediate decree of constitution; that the provision in the trust-deed was merely a declaration of the rule of the common law, that if there should not be sufficient funds to pay the whole legacies, each of them should suffer a corresponding abatement; and that a decree of constitution would not prevent the defenders from pleading that defalcation, if it should happen to exist. The Court altered, pronounced decree of constitution, and found expenses due, under deduction of those necessary for obtaining such a decree.

LORD PRESIDENT.—All that the pursuers demand, is a decree constituting their debt against the trust, which they are entitled to. If there be no trust-funds, the decree will be of little avail; and if there be a defalcation, there must be a diminution corresponding with that to be suffered by the other legatees.

LORD GILLIES.—A decree against these trustees is nothing else than a decree in terms of the will, and of course subjecting the legacy to a diminution, if there should be a defalcation.

The other Judges concurred.

Pursuers' Authorities.—Preston, July 8. 1634, (3381); 3. Stair, 8. 39; 3. Ersk. 9. 12.

A. PEARSON, W. S.—J. BURN, W. S.—Agents.

No. 40.

A. MILLAR, Complainer.—*D. of F. Moncreiff.*
J. GIBSON-CRAIG and Others, Respondents.—*Sol.-Gen. Hope.*

Royal Burgh—Process.—A petition and complaint against an election of Magistrates, in name of a member of the Town Council of the burgh, having been presented by one counsel, the Court refused to allow it to be withdrawn by another counsel holding a written mandate to that effect from the complainer, before ordering service; but appointed it to be served, reserving all objections.

Nov. 29. 1826.
2D DIVISION.
B.

A petition and complaint, in name of Andrew Millar, against the election of certain members of the Town Council of Culross at Michaelmas last, was presented at the Bar by Mr. Solicitor-General, in order to be written on, so as to keep it within the two months allowed by act of Parliament, 16th Geo. II. c. 11. It was accordingly superseded till this day, when a motion for an order for service, &c. having been made by Mr. Solicitor-General, Mr. Dean of Faculty appeared at the Bar with a written mandate from Millar, dated the 28th of November, disclaiming the petition, and recalling any authority which he might be supposed to have given for presenting it; and Mr. Dean accordingly, on the part of Millar, craved to withdraw it. This was opposed by

Mr. Solicitor-General, (who did not, however, produce any written mandate from Millar,) on the ground that the petition being once duly before the Court, they could do nothing but order service, and remit to the Lord Ordinary in terms of the late act of Parliament. On the other hand, it was contended by Mr. Dean of Faculty, that a party might withdraw a petition and complaint at any stage, and that the Court could not proprio motu order service, without a motion by the party who here disclaimed the process. The Court appointed the petition to be served, and remitted to the Lord Ordinary, reserving all objections founded on the disclamation, as to which a minute was allowed to be given in by Mr. Dean of Faculty.*

Lords Justice-Clerk, Glenlee, and Pitmilly were of opinion that the Court could follow no other course than order service, &c. in terms of the late Judicature Act; and that, in consequence of the reservation of the objection, no injury could arise to any party from this procedure.

Lord Alloway, on the other hand, held that the Court were not entitled to prevent a party from withdrawing his complaint, or to order service, when the party himself opposed it; and that if there was any doubt as to which course Millar really meant to adopt, or which counsel he had truly authorized, it ought to be inquired into before service, the more especially as the presenting the petition was sufficient to avoid the statutory limitation, and thus preserve the rights of all parties having interest.

J. Rose, W. S. Agent.

M. Alexander and Others, Pursuers.—*J. Millar.*
J. and W. Inglis, Defenders.—*Bruce.*

No. 41.

Nov. 29. 1826.
2d Division.
Lord Medwyn.
M'K.

This was an action concluding for reduction of a confirmation of executors to a party deceased, and depended on a proof as to propinquity. The Lord Ordinary, satisfied that the pursuers had failed to establish any relationship to the deceased, assoilzied the defenders, and the Court adhered.

H. Watson, W. S.—W. Smith,—Agents.

* A note, praying to withdraw the complaint, was, a few days afterwards, given in for Millar, accompanied by a mandate dated 30th November; but, when moved, a counter mandate of the same date was produced on the other side of the Bar, authorizing the prosecution of the complaint. The Court refused the note.

No. 42. A. CAMPBELL, and his CURATORS and INTERDICTORS, Pursuers and Suspenders.—*M'Farlan.*

R. HILL, Charger and Defender.—*Cuninghame.*

Judicial Examination—Bill of Exchange.—Court refused to allow the holder of a bill to be judicially examined as to his not being a bonâ fide onerous indorsee, and as to his knowledge of the manner in which it had been obtained from the acceptor, a minor of facile disposition, on the ground that there was not sufficient cause of suspicion against him, and that a proof had been taken, on which a judgment of the Inner House had been pronounced in his favour, before the examination was craved.

Nov. 29. 1826.
2D DIVISION.
Lord Reston.
M'K.

THIS was a case somewhat similar to that mentioned ante, Vol. I. No. 308, between the pursuer and Turner. The pursuer, who was of an extremely facile disposition, had in his minority been induced, chiefly by one Carlaw, by means of fraud and circumvention, to grant a number of bills of exchange without value; and two of these having been indorsed by Carlaw to the defender Hill, a horse-dealer, who gave a charge thereon, Campbell, with concurrence of his curators and interdictors, brought the present process of suspension and reduction, on the grounds of facility, minority, lesion, and circumvention. In defence it was pleaded, that Campbell had been in use to grant bills in the course of the management of his farm, and that Hill was a bonâ fide onerous indorsee. A proof was led; on advising which, the Lord Ordinary, 'in respect that the pursuer 'Andrew Campbell, though only 19 years of age, and to a con-'siderable degree facile and improvident at the date of the bills 'in question, managed his farm, and was in the habit of granting 'bills in the course of his management, found that the bills grant-'ed by him were effectual in the hands of a bonâ fide onerous in-'dorsee, and that the defender's claim to that character has not 'been legally disproved.' His Lordship therefore assoilzied the defender, and found the letters orderly proceeded.

The Court having adhered to this interlocutor, (Jan. 12. 1819,) Campbell presented a reclaiming petition, praying to have Hill ordained to appear and undergo a judicial examination—a course which was afterwards allowed in the other case with Turner. This petition was allowed to lie over for several years; but answers having at last been lodged, objecting to the competency of allowing a judicial examination after a proof had been led and judgment pronounced, it was now put to the roll, when the prayer for a judicial examination was refused, and the interlocutor adhered to.

LORD JUSTICE-CLERK.—There were some very peculiar and suspicious circumstances in the case with Turner, which induced the Court to allow the judicial examination; they do not occur here, and I do not think that the present demand should be listened to.

LORD ALLOWAY.—The judicial examination of the onerous holder of a bill should not be allowed, except in circumstances of the strongest suspicion. I do not go so far as to say that it should never take place; but I think it ought to be refused here.

LORD PITMILLY.—It is not necessary to consider the general competency of allowing judicial examinations in cases of this kind. Even at the beginning of a case, I would not allow it on a vague allegation of fraud; but in certain cases it may properly be permitted at the commencement of a cause, as it may prevent the necessity of proof, or afford aid in the investigation; and it is for these purposes that judicial examinations have formerly been allowed, as is very distinctly laid down in the case of Goodfellow, July 27. 1785, (1483.) After a proof has been led, however, and the party is brought into the situation that he can only have recourse to the holder's oath, it is utterly unjust to allow a previous judicial examination; and it ought to be an invariable rule, that in such circumstances a judicial examination should not be allowed.

LORD GLENLEE.—I always understood that it was contrary to settled law to examine a man judicially on facts only provable by his writ or oath; but if it is to take place at all as to the onerosity of a bill, it cannot, in the ordinary case, be in initio litis. It may turn out in the course of the proof that strong suspicions are thrown on the holder, and then I do not see the objection to a judicial examination; and that was the state of the case in the question with Turner, where it was allowed on account of suspicious circumstances coming out in the course of the process, as his saying he had no books, and afterwards producing them; but there is no vestige in the proof before us here to lead to such suspicion as would justify a judicial examination.

Pursuers' Authority.—Campbell *v.* Turner, Jan. 24. 1822, (ante, Vol. I. No. 308.)
Defender's Authority.—M'Intosh, May 27. 1823, (ante, Vol. II. No. 323.)

TOD and WRIGHT, W.S.—J. DONALDSON,—Agents.

No. 43. J. MITCHELL, Advocator.—*Jeffrey—Robertson.*
R. BROWN and Others, Respondents.—*D. of F. Moncreiff—Rutherfurd.*

Servitude—Road.—Held, that a road on which there were two flights of stairs, was not a horse and carriage road, but only a footpath.

Nov. 30. 1826.
1ST DIVISION.
Lord Eldin.

THIS was a question as to whether a road which had been originally only six feet broad, but had been lately extended to nine, situated in the village of Water of Leith, was a footpath, or was to be held as a horse and cart road. An action having been brought by Brown and others, before the Sheriff of Edinburgh, against Mitchell, praying for interdict against his using it as a horse and cart road, he stated that he had bought a house and piece of ground in 1821 from the trustee on John Hutton's estate, (the former proprietor of the subjects through which the road was formed); that in the disposition it was described as a common passage way, and that he had thenceforth made use of it as a horse and cart road, so as to have access to his stables. On the other hand, Brown and others stated, that for a great many years it had been exclusively made use of as a footway; that it was extremely steep; that in the course of it there were two flights of steps, and that it was impossible to lead horses along it without danger to themselves and to the neighbours. The Sheriff found 'that the lane in question is common property to 'the pursuers, the defender, and other proprietors in said lane; 'that it is admitted by the defender that the said lane was only a 'foot road, and was not used as a road for horses and carts until 'the defender, in 1821, purchased the premises now belonging 'to him; and therefore, in respect the pursuers are entitled to 'a possessory judgment, found the defender not entitled to use 'the said lane as a horse road, until he either obtain the consent 'of the other proprietors, or until he have his right so to use the 'said lane declared in an action of declarator;' interdicted him from using it as a horse road, and found him liable in expenses.

Mitchell having brought an advocation, the Lord Ordinary advocated the cause, and dismissed the action, 'in respect that 'the road in question was at first only six and a half feet wide, 'and was lately enlarged by the advocator and others by the addition of two feet and a half, and is their joint property; that 'the proprietors of the road are subject to no restriction in the 'use thereof, and that the advocator has been in the practice of 'using the said road with horses; and it is presumable that the 'road was widened for the purpose of introducing horses, and,

'if necessary, carriages.' But the Court unanimously altered, and remitted simpliciter.

LORD BALGRAY.—It is impossible, when we regard the nature of the subject, the use which has hitherto been made of it, and the acts of the parties themselves, that we can hold this lane as any thing else than a common way for foot passengers, and not for horses; and as the parties are joint proprietors, no alteration can be made on the state of the possession without the consent of each of them.

LORD PRESIDENT.—There are several flights of steps, which are rather uncommon on roads for horses and carriages. Independent of every other circumstance, they show that the lane was intended to be used merely as a foot road for passengers.

LORD CRAIGIE.—I visited the road, and it is impossible for any person, on inspecting it, to conceive that it could be intended for a horse and carriage road. There are six steps of stairs in one flight, by which alone it would be impracticable to make use of it as a horse road.

LORD GILLIES concurred.

W. LANDERS,—P. CROOKS, W. S.—Agents.

DUKE of BUCCLEUCH, Pursuer.—*Thomson—Pringle.* No. 44.
Sir W. A. CUNYNGHAME, Defender.—*D. of F. Moncreiff—Jameson.*

Prescription—Minor.—Held,—1.—That a party having possessed an estate on a title from the Crown for upwards of forty years, had acquired a prescriptive right, although his title bore that the Crown had right by virtue of the act of annexation, in which there is an express exception of the right of the Crown to such lands;—and,—2.—That, in computing the period of forty years, the minority of an heir-substitute of entail is not to be deducted.

Nov. 30, 1826.

1ST DIVISION. Lord Eldin. S.

THE Collegiate Kirk of Dalkeith was founded by James Earl of Morton for a provost and a certain number of prebendaries, and other inferior beneficiaries, reserving to himself, and to his heirs and successors, the right of patronage. Among other endowments of this kirk were the lands of Howden and Dechmont, in the barony of West Calder and county of Edinburgh. In 1586 the titular provost and prebendaries, with consent of the patron, feued out these lands; and in 1587 the feu-rights were confirmed by the Crown, agreeably to the acts 1564, c. 88, and 1584, c. 7.

By the statute 1587, c. 29, containing the general annexation to the Crown of the temporalities of ecclesiastical benefices, an exception was made of 'all landis, baronies, tenementis, an-

'nual rentis, and uther commodities quhatsumever, quhilkis per-
'tenit of befoir to quhatsumever benefice, greit or small, being
'of laic patronages: To the quhilkis the said annexatioun sall
'not be extendit, nor comprehend the same, to the effect that
'nane of the saidis laic patronis be hurt or damnifiet thairby.'

Again, by 1592, c. 158, it is declared, 'that it was never his
'Majesty's intention ather to prejudge the saids laick patrones
'in the patronages, or the person provided to the said preben-
'daries and chaiplanries, of any part of the fruites and emolu-
'mentis conteined in the antient fundationes maid be the said
'laick patrones.'

And it was enacted, by 1661, c. 54, in reference to the vassals of provostries, &c. 'that the entry of the saidis vassals by retour,
'&c. shall pertain to the laick patrons and their successors, who
'stand infeft in the said laick patronages holding immediately of
'his Majesty.'

The right of patronage of the above provostry, after remaining for some time in the family of Morton, passed into that of Buccleuch, and accordingly, prior to 1778, all the vassals of the lands of Howden and Dechmont obtained entries from the latter family. In that year, however, Sir William Augustus Cunynghame, who was proprietor of Over and Nether Craig, (forming part of the barony of Calder, and which held directly of the Crown,) having acquired the lands of Nether Howden and Nether Dechmont, (which held of the Duke of Buccleuch, as in right of the laick patron,) resigned the whole of these lands into the hands of his Majesty's commissioners, and expede a Crown charter of resignation, on which infeftment was taken and recorded in September 1778. The quæquidem clause stated, that the lands had been resigned into the hands of the Barons of Exchequer, 'tanquam in manibus nostris, immediatis superioribus
'prædictarum terrarum de Over et Nether Craig, cum decimis
'et pertinentiis de quibus semper tenebantur, et tanquam imme-
'diatis superioribus prædictarum terrarum de Nether Howden,
'cum pertinentiis, virtute annexationis superioritatis terrarum
'ecclesiasticarum ad Coronam, sicut eædem perprius tenebantur
'de præposito ecclesiæ collegiatæ de Dalkeith.'

And the tenendas and reddendo clauses were thus expressed:
'Tenendas et habendas totas et integras prædictas terras, decimas
'aliasque supra specificatas, dict. Domino Gulielmo Augusto
'Cunynghame, ejusque prædict., modo infra mentionato, viz.—
'Dictas terras de Over et Nether Craig, cum decimis et pertinen.,
'de nobis nostrisque regiis successoribus, immediatis legitimis su-
'perioribus earundem, in liberâ albafirmâ; et prædict. terras de

'Nether Howden et Nether Dechmont, cum pertinen., quæ per-
'prius de præposito ecclesiæ collegiatæ de Dalkeith tenebantur
'de nobis nostrisque regiis successoribus, tanquam immediatis
'legitimis superioribus earundem, virtute annexationis superior-
'itatis terrarum ecclesiasticarum ad Coronam, in feodo et hæredi-
'tate in perpetuum, per omnes rectas metas, &c.—Reddendo an-
'nuatim dict. Dominus Gulielmus Augustus Cunynghame, ejus-
'que prædict., nobis nostrisque regiis successoribus, pro prædictis
'terris de Over et Nether Craig, et decimis, rectoriis et vicariis,
'earundem et pertinen., proportionalem partem unius partis cal-
'carum deauratorum, vel pro eisdem duos solidos argenti, apud
'festum Pentecostes, nomine albæ firmæ, si petatur, tanquam alba
'firma divoria dict. totarum terrarum et baroniæ de Calder, cu-
'jus dictæ terræ de Over et Nether Craig fuerunt partes: Et red-
'den. nobis, nostrisque regiis successoribus, tanquam devenien. in
'loco præpositi ecclesiæ collegiatæ de Dalkeith, virtute annexa-
'tionis superioritatis terrarum ecclesiasticarum ad Coronam, vel
'domino erectionis dict. præposituræ, vel illis jus ab eo derivant-
'ibus, pro supramentionatis terris de Nether Howden et terris
'de Nether Dechmont, diversas feudifirmæ divorias subtus spe-
'cificat. viz. Pro prædictis terris de Nether Howden, cum perti-
'nen., summam sex librarum trium solidorum et quatuor denar-
'iorum monetæ Scotiæ, ad duos anni terminos consuetos, festa,
'viz. Pentecostes et Sancti Martini in hieme, per equales por-
'tiones, tanquam antiquam feudifirmam inde solvi solitam, nec-
'non summam trium solidorum monetæ Scotiæ pro annuâ aug-
'mentatione rentalis novæ feud.,' &c.

In virtue of these titles, Sir William was enrolled as a free-holder in 1779, and thenceforth possessed the lands.

In 1778 he expede a Crown charter of another portion of the same lands, on which infeftment was taken; but this having been discovered by the agents of the Duke of Buccleuch, a reduction was brought, and decree obtained. No objection, however, was made to the titles relative to the other part of the lands, which had been previously made up.

In 1819 Charles Duke of Buccleuch died, and was succeeded by his son, the present pursuer, who was then thirteen years of age, as heir of entail. In December 1825 he brought an action of reduction of the above titles of the defender, on the ground that as he was the true superior of the lands of Howden and Dechmont, and as the titles of the defender were ex facie inept, seeing that, by referring to the act of annexation, they shewed that they had been derived a non habente potestatem;

and, at all events, as he had been minor during part of the defender's possession, he was entitled to have them set aside.

In defence, Sir William founded on his titles and possession for forty years as a title to exclude, and he contended,

1. That even although it were true that he had derived these titles a non habente potestatem, yet as he had possessed without interruption for upwards of forty years, a prescriptive right had been obtained, and as the very object of prescription was to cure bad titles, it was not competent to inquire whether they had been derived from the proper superior or not.

2. That it was not competent to go beyond the deed itself; and as it was affirmed upon the face of it that the Crown was, by virtue of the act of annexation, the true superior, this must be held to be the fact; and that no reference could be made to the statute, which, in this matter, was merely the ground or warrant of the charter; and,

3. That it had been settled by a series of decisions that the minorities of heirs-substitutes of entail could not be taken into consideration in computing the prescriptive period.

To this it was answered,

1. That as the act of annexation was a public statute,—as it expressly excepted laick patronages,—as every one must be held to have been acquainted with that public statute,—as reference was expressly made to it in the charter, and as it was essential to a prescriptive title that it should be ex facie clear and unexceptionable, otherwise there could be no bona fides, the defender must be held to have known that his titles were derived a non habente potestatem, and therefore to have possessed in malâ fide; and,

2. That although there were, no doubt, several decisions finding that the minorities of heirs of entail were not to be deducted in calculating the prescriptive period, yet their fallacy had been pointed out by Lord Chancellor Thurlow in the Bargany cause, and the question still remained open.

The Lord Ordinary 'sustained the title to exclude founded on 'by the defender,' assoilzied him from the action, and found expenses due; and to this interlocutor the Court, on advising Cases, adhered.

LORD BALGRAY.—The case of the pursuer is quite untenable. The title of the defender is complete in itself, and he has had forty years possession. Even granting that the titles had been derived a non domino, still he is entitled to plead prescription, whereby any inquiry into that fact, or into mala fides, is excluded. In the case of

Forbes of Callendar, (ante, Vol. I. No. 382.) a prescriptive title was sustained relative to coal, although originally it was excepted from the conveyance; but having been inserted in the subsequent titles, and possession having been enjoyed for 40 years, the right to the coal was held to be undoubted.

Lord Craigie.—In general, I concur in the opinion which has been delivered. I have always understood that the exception of falsehood in relation to prescription meant that the title was forged; but I have some doubts whether it would not apply where, ex facie of the title, there is a manifest falsehood. It may also be doubted whether the superior could, in such a case as this, acquire a prescriptive right, so as to give a valid title.

Lord Gillies.—It would be a serious question indeed, if we were to deny effect to a prescriptive title, because it appeared ex facie of the deed that the former titles had not been correctly deduced, or that a wrong one had been stated. This is truly the nature of the objection which is now made.

Lord President.—It can scarcely ever happen that there is a prescriptive title without some falsehood connected with it. If the title be in itself perfectly good, and derived from the true proprietor, there can be no need of prescription, which is only necessary to cure bad titles. It may no doubt, as observed by Lord Craigie, be a question, whether the Crown has acquired a proper prescriptive right, as superior of the lands; but that cannot affect the vassal, and so we found in the case of Spottiswoode. Indeed the Crown is superior of all the lands in the country; and if no other superior grants a title, the vassal may obtain one from the Crown; so that here it is not correct to say that the titles in question have been derived a non habente potestatem.

Pursuer's Authority.—(1.)—2. Stair, 12. 7.
Defender's Authorities.—(1.)—3. Erak. 7. 4; Miller, Feb. 7. 1776, (10942); Hailes' Decisions, 378.

J. Home and J. Gibson, W. S.—Tod and Hill, W. S.—Agents.

J. Rucker, Pursuer.—*D. of F. Moncreiff—More.*
J. G. C. Fischer and Others, Defenders.—*Jeffrey—Murray.*

No. 45.

Nov. 30. 1826.

2d Division.
Lord Mackenzie.
F.

In the case mentioned ante, Vol. IV. No. 292, the Court remitted to the Lord Ordinary to consider the question of expenses. His Lordship found no expenses due; but the Court altered, and found the pursuer entitled to expenses, subject to modification.

Renton and Grant, W. S.—T. Ewart, W. S.—Agents.

No. 46. A. CRANSTOUN, JOHN HAY, and Others, Pursuers.—*Gillies.*
W. SCOTT, Defender.—*Boswell.*

Judicial Factor—A. S. Feb. 13. 1730.—Held,—1.—That a judicial factor loco tutoris under the above act of sederunt, is liable in interest upon interest on sums which he had neglected to recover in terms thereof;—and,—2.—That, by neglecting to comply with the rules of the A. S., he is not entitled to any commission.

Dec. 1. 1826.
1ST DIVISION.
Lord Meadowbank.
S.

ROBERT CRANSTOUN died in February 1798, leaving an infant son and six daughters, some of whom were under age, and others in majority. He was proprietor of the lands of Bongate; held leases of various farms; and was possessed of funds to a pretty large amount. In the month of March of the same year, the defender Mr. Scott was appointed factor loco tutoris for the minor children, in terms of the act of sederunt 13th February 1730. He entered into possession; and, at the distance of six months thereafter, lodged in the clerk's hands inventories containing a general specification of the funds and effects of Mr. Cranstoun. He, however, never lodged any other account until he was called in this action, after the lapse of 12 years.

With a view to recover the funds, he employed a Mr. Reid, writer in Jedburgh, as his agent, who kept a current account of the different items which he realized, and of the sums which he expended, and brought out occasionally the balance thence arising.

Mr. Cranstoun had lent three sums of £300, £122: 13: 6, and £25: 5: 9, to George, James, and Robert Bell, jointly and severally. Robert died bankrupt a few months after Mr. Cranstoun's death; and, after considerable delay, the defender realized, at Whitsunday 1808, about £300 from the estates of the other two obligants, who in the mean while had become insolvent.

The defender also employed Messrs. Riddell and Gillon, writers to the signet, to lend out certain sums of money, which they accordingly did; but although he alleged that the interest of these sums was regularly received by Mr. Gillon, yet he did not uplift it from him, and employ it at interest for behalf of the minors.

Prior to his death, Mr. Cranstoun was creditor by bill for £155 of three persons of the names of Dickson, Gray, and Robson, and which was indorsed by a person of the name of Potts. The three former became bankrupt; but although Potts remained solvent, no steps were adopted by the defender to recover the debt for a considerable time thereafter.

In 1809 the pursuer John Hay (who had married one of Mr.

Cranstoun's daughters) presented a petition and complaint to the Court against the defender for having violated the act of sederunt, and praying to have him ordained forthwith to lodge accounts, and removed from his office. Thereafter he, together with the other children, brought an action of count and reckoning; and the petition having been remitted to the Lord Ordinary, and the defender having been removed, the two processes were conjoined. In defence, he denied that he had any funds in his hands at all, and alleged that at all events arrestments had been executed against him since the date of the action. A great deal of procedure ensued, and several remits were made to an accountant, who ultimately reported a balance of about £500 as being due by the defender. This report being objected to, the chief questions which arose were,

1. Whether the defender had duly complied with the act of sederunt, and had exercised proper diligence in recovering the funds belonging to the estate under his management.

2. Whether he was chargeable with interest upon interest of the funds in his hands, or which he ought to have realized, and if so, from what period; and,

3. Whether he was entitled to any commission as factor.

On the part of the pursuers it was maintained,

1. That by not lodging accounts in terms of the act of sederunt, he had exposed himself to the penalties thereof; and that as he had been negligent in recovering the debt from Bells, he must be liable for that part of it which had not been realized.

2. That he was liable for interest on each principal sum after the expiration of one year from the time when the same became due:—that that interest must then be regarded as capital, and interest charged upon it:—that in reference to the accounts of his agent, Mr. Reid, the same rule must be followed, without regard to the periods when he thought proper to strike a balance; and that if the defender did not recover the interest from Riddell and Gillon, and lay it out at interest, he was blameable in so doing, and must be liable in that interest, together with interest thereon, according to the above principle:—that he was also chargeable with interest upon interest of the funds in his hands, notwithstanding the arrestments, because, as he had denied that there were any such funds, the pursuers were thereby prevented from loosing the arrestments; and as he ought to have paid any balance in his hands when called on by the petition and complaint, he could not avail himself of that defence to protect him against liability for interest; and,

3. That, as he had violated the act of sederunt, he had no right to any commission whatever.

To this it was answered,

1. That the defender had lodged accounts within the requisite period, and although he had omitted to do so annually thereafter, yet no loss or injury could be alleged to have been thereby sustained; that from the nature of the estate, and from the confusion in which it had been left, and from Mr. Cranstoun having kept no books, it had become necessary to employ law agents, and as much activity had been exerted in recovering the funds as in the circumstances was practicable.

2. That as there were continual outlays, it became necessary to keep an account-current with the law agent; and that as the balance was continually fluctuating, and as the defender had realized the funds without undue delay, it was not consistent with equity that he should be subjected in interest upon interest; and,

3. That although perhaps he had deviated in some respects from the act of sederunt, yet as his duty had been of a most laborious and difficult nature, he ought to be found entitled to commission.

The Lord Ordinary found 'that the accounts of the defender 'ought in every particular to have been made up upon the 'principle that he was due interest from one year after the date 'when each sum was or might have been recovered; and that 'it can make no difference upon the accounting, whether the 'money was or ought to have been recovered by himself, or by 'an agent for his behoof; therefore that the interest ought to be 'charged, not from the date of the balance of the annual accounts 'furnished by Andrew Reid, but from one year after the date 'when the several sums were received by him on account of the 'defender as factor: Finds, it being admitted that George, 'James, and Robert Bell were conjunctly and severally bound 'for the debts of £300, £122: 13: 6, and £25: 5: 9, and 'that although Robert is represented to be insolvent, it was the 'duty of the defender to have done his uttermost to have re-'covered from the co-obligants, who were otherwise; and that no 'evidence has been produced of steps for that purpose having been 'taken: Finds that the factor must be charged with the prin-'cipal sum of the said debt which has not been recovered, and 'with interest on the whole of the said debt from one year after 'the same became due, and also with interest upon the annual 'rent thereof from one year after the term of payment of such 'annual rent: Finds that it was incumbent on the defender to 'have satisfied himself that the debts due by Riddell and Gillon 'were duly lent out and received in terms of his directions to 'those agents, and that he must be liable in interest upon the an-

'nual rent of such sums from one year after the terms when the 'same would have been payable, had his directions been duly ob- 'served: Finds that Dickson, Gray, and Robson having become 'insolvent, it was incumbent on the defender to have taken im- 'mediate steps for recovering the debt due by the cautioner Potts; 'and no evidence being produced sufficient to establish that such 'steps were taken, finds that the defender is liable in legal in- 'terest on the said debt from and after twelve calendar months 'from the period when the same became due by the principal 'debtors: Finds that the defender ought to be charged with in- 'terest on the funds of the minors, after the expiry of his factory, 'in the same manner as before, excepting always on such sums 'as were duly attached in his hands by legal diligence, and for 'which interest, at the same rate as was payable by the public 'banks, is alone due: Finds that in all cases the claim of factors 'appointed by the Court of Session, for remuneration for the 'trouble incurred by them in the matters committed to their 'charge, is founded altogether upon equity, and that its amount 'must depend upon due consideration of the extent of the fund, 'the degree of trouble incurred, and the conduct of the factor 'himself, and that either to the effect of disallowing commission 'altogether, or of modifying the same: Finds, that it being ad- 'mitted on the one hand that the defender failed to lodge his fac- 'tory accounts, in terms of the act of sederunt, during those years 'when the factory existed, while, on the other, no injury has been 'alleged to have been incurred by the estate of the minors by the 'said failure, the claim to commission ought to be sustained, but 'subject to great modification: Therefore, having considered the 'peculiar circumstances in which the defender was placed, finds 'that the commission allowed to the factor, at the rate of five per 'cent., ought to be restricted to two and a half per cent., and that 'that allowed to him at the rate of one per cent. ought to be con- 'tinued at the same rate, from which will fall to be deducted 'the sums in name of commission charged in Reid's accounts, 'and finds him entitled to credit for such restricted rate of com- 'mission accordingly;' and remitted to the accountant to report.

Both parties having reclaimed, the Court found, 'That the 'sums of money, principal and interest, which were in the factor's 'hands at the expiry of the factory, shall be at that period accu- 'mulated into a principal sum bearing legal interest from that 'date, and that the arrestments used in the factor's hands do not 'interrupt the currency of the said interest, or the liability of the 'factor to pay the same; and, secondly, That, in the circumstan- 'ces of the case, the factor is not entitled to receive any commission 'for management of the said estate; but, quoad ultra, adhered.'

LORD BALGRAY.—My only doubt relates to the mode of accumulating the interest after the expiration of the office. It is true that, during its existence, the factor was bound to accumulate annually, and that he must be chargeable with accumulations accordingly; but, after the office was at an end, he became an ordinary debtor, and thenceforth I think that he was liable in simple interest only. In regard to the claim for commission, it appears to me that this case affords a very proper opportunity for showing that we will strictly enforce the duty of factors. Where they perform that duty properly, and lodge regular accounts, so as to afford a check against them, we allow an ample commission. It is no answer to say, after the lapse of a long period, that no loss or injury can be shown to have been thereby sustained. The very circumstance of the accounts not being lodged disables the party from condescending on his loss, and therefore we should rigidly enforce this rule. Taking the whole circumstances into consideration, I am satisfied that no commission ought to be allowed.

LORD CRAIGIE.—I am of the same opinion; and although it may be hard to inflict such a penalty, I think it absolutely necessary, in the circumstances of this case, to refuse commission; and it appears to me that it would be proper that our interlocutor should be inserted in the acts of sederunt.

LORD GILLIES.—In depriving this factor of commission, we are doing nothing extraordinary, but merely enforcing a proper and correct rule.

LORD PRESIDENT.—I am of the same opinion. A factor, under the act of sederunt, is bound to accumulate the interest and principal at stated periods. This accumulated fund is thenceforth a capital which must bear legal interest, just as if he had granted a bond for it. As to the arrestments, I rather think that the answer which has been made by the pursuers is good; but at all events, as it appears that these arrestments were not executed till after this action had been brought, the defender ought to have been then ready to have paid the sum; and as he delayed to do so, he must be liable in interest. I am also perfectly clear that no commission should be allowed.

W. SMITH,—J. GREIG, W. S.—Agents.

No. 47. J. SPROAT, Pursuer.—*D. of F. Moncreiff—Bruce.*
W. MURE and Others, CORRIE'S TRUSTEES, Defenders.—
Fullerton—Maitland.

Process—Stat. 6. Geo. IV. c. 120.—Objections to a record, as irregularly prepared.

Dec. 1. 1826.
1ST DIVISION.
Lord Meadowbank.
H.

SPROAT, a creditor of the late James Corrie, brought an action, early in 1824, against Mure and others, his trustees, concluding for count and reckoning, and payment of his debt. After a

great deal of procedure under the old forms of process, the Lord Ordinary, on the 12th November 1825, issued notes of his opinion, that certain preliminary defences should be repelled, and others of a peremptory nature should be sustained; but that the pursuer should give in a condescendence of what he averred relative to the intromission by the trustees with certain subrents. Accordingly, on the 18th of that month, he appointed the 'pursuer to 'give in a condescendence, framed in terms of the late statute 'and act of sederunt, stating articulately the facts he avers and 'offers to instruct, as set forth in the foregoing note, and that 'within 14 days, to be seen and answered within 14 days there-'after; and when so lodged, appoints the same to be revised; 'the revised condescendence, accompanied with a note of pleas 'in law, to be given in within 14 days thereafter.' His Lordship, however, did not pronounce any interlocutor on the other points of the cause. Condescendence and answers, with notes of pleas in law, were accordingly lodged relative to the subrents, and the record was closed. A debate then took place; and a multiplepoinding having been brought by the trustees, the Lord Ordinary conjoined it with the action of count and reckoning, and thereupon reported the whole cause to the Court on revised Cases. When it was moved in the short roll, the Court considered the record as improperly made up, delayed giving judgment, and thereafter, to prevent further expense, recommended the parties to take the case out of Court by submission.

LORD PRESIDENT.—This is one of those records to which I alluded in the early part of the session; and if we pass it over, the new forms may be thrown aside as utterly useless. The condescendence is not even in terms of the old act of sederunt. The facts and law are mixed together, and there are long argumentative passages. I observe also that the parties here, as in many other cases, do not state that they 'aver and offer to prove' that which they condescend on, and which is expressly required by the statute. After reading these papers, I resolved that I would not judge on such a record, but leave your Lordships to do what you thought fit.

Dean of Faculty.—The case comes before the Court under somewhat peculiar circumstances. It originated under the old form of process, and, till latterly, was prepared accordingly. In the Outer House both parties endeavoured to have the case put into a different shape; but it appeared to the Lord Ordinary that the record should be confined to one point only, and in this way the condescendence is limited to that point alone. As this was the first cause on which it was attempted to engraft the new forms on the old, some indulgence ought to be allowed. It is sufficient, however, to state that the

papers were laid before the Lord Ordinary, who did not see any objection to them; that he adjusted the record, and then heard the parties, and afterwards ordered Cases on the whole cause.

LORD PRESIDENT.—But you were certainly to blame in putting in such a condescendence, and the Lord Ordinary ought not to have received it.

Dean of Faculty.—I do not say that the condescendence is correctly drawn; but, in the peculiar circumstances under which this case comes before the Court, we hope that you will give us judgment.

Fullerton.—The respondent was under the necessity, in framing his answer, to meet the condescendence of the pursuer; but we stated in the outset, that it 'had been prepared with an anxious disregard 'both of the late statute and of the act of sederunt.'

LORD BALGRAY.—In the circumstances under which this case came before us, perhaps the parties may be ordered to give in a note of the points on which our decision is required.

LORD PRESIDENT.—We have no authority for doing so; and as the case has been prepared under the statute, we must observe the rules enjoined by it. A respondent stands in a peculiar situation, and may be led into irregularity by his opponent; but we cannot on that account disregard the statute. And I take this opportunity of requesting, that the country and Parliament may understand, that if this record be received, the violation of the statute has not been sanctioned by me.

LORD GILLIES.—I am equally resolved strictly to enforce the forms prescribed by the statute; but there is a peculiarity here, from the circumstance of the case having been prepared partly under the old and partly under the new system.

LORDS BALGRAY and CRAIGIE having also expressed similar sentiments, the case was at first delayed, and thereafter a recommendation to submit the case was given.

D. TURNBULL, W. S.—T. CORRIE and D. WELSH, W. S.—Agents.

No. 48.

Miss JUSTICE, Pursuer.—*D. of F. Moncreiff—Brown.*
W. B. CALLENDER, Defender.—*Sol.-Gen. Hope—Baird.*

Warrandice—Passive Title.—A party having purchased lands with the price of teinds sold by him under a warrandice against augmentations, and taken the lands to himself in liferent, and to his son and a series of heirs in fee; and augmentations having been granted; and an adjudication founded on the warrandice having been brought—Held that an heir, who had made up titles to the fiar, and not to the liferenter, could not oppose it.

Dec. 1. 1826.
1ST DIVISION.
Lord Eldin.
S.

SIR JAMES JUSTICE, proprietor of the estate of Crichton in the county of Edinburgh, conveyed it, in 1735, to George Livingstone, by a disposition ex facie absolute; but which was qualified by a back bond, by which Livingstone declared that he held the

estate in trust to enable him to sell the lands to pay the debts of Sir James, and to invest the residue in such manner as he should appoint. Sir James having soon thereafter died, the above transaction was confirmed by his son James, who at the same time conveyed a small property of his own, called Rosehill, to Livingstone in trust; but stipulating that the residue of the price of both estates should be invested in the purchase of lands for behoof of himself in liferent, and his son Alexander and a series of heirs in fee. In 1738 Livingstone sold the estates, together with the teinds, to Mark Pringle, Esq. in whose favour a disposition was granted with consent of James Justice. This deed contained the following clause of warrandice: 'And further, because the said Mark 'Pringle has paid as great a price for the teinds of the said lands, 'and others above disponed, as for the stock, therefore I the 'said Mr. James Justice bind and oblige me and my foresaids 'to warrant, acquit, and defend the said Mark Pringle from all 'ministers' stipends, future augmentations, and other burdens of 'whatsoever nature, imposed or that shall be imposed upon the 'said teinds, parsonage or vicarage,' except the stipend then payable to the minister, which was 10 bolls of bear, 15 bolls of meal, and £466: 13: 4 Scotch money. Mr. Pringle then granted a bond for the price, into which there was introduced this clause: 'And for the said Mark Pringle and his foresaids their further 'security, and in corroboration of the foresaid clause of warran-'dice contained in the said disposition, so far as it concerns future 'augmentations of minister's stipend, or other burden that may 'be imposed on the said teinds, it shall be lawful to the said 'Mark Pringle to retain so much of the sums contained in the 'said bond as may be sufficient to answer any augmentation of 'the said teinds, until the said George Livingstone and James 'Justice shall, at the sight of Mr. Robert Craigie of Glendoich, 'and Mr. Henry Home, advocates, or failing either of them, at 'the sight of the survivor, secure so much of the said sums in 'such manner as the said Mark Pringle and his foresaids may 'have sufficient real warrandice against such eviction, by aug-'mentation of stipend, or other burden imposed upon the said 'teinds; and which eviction is hereby agreed to be rated at 24 'years purchase thereof, being the price paid for the said whole 'lands and teinds.' Thereafter Mr. Pringle paid the price; and there being a reversion, Livingstone purchased the lands of Ugston and Over Howden in Berwickshire. The titles by which these lands were conveyed, bore that the price had been paid 'out of the reversion of the price of the lands and barony of 'Crichton,' and they were taken 'to and in favour of the said

'James Justice and Mrs. Margaret Murray, his wife, and the 'longest liver of them two, in liferent, and to Alexander Justice, 'their son, in fee, and the heirs, male or female, to be procreated 'of his body; whom failing, a series of heirs-substitutes.' In the disposition of Ugston, it was provided that 'the said lands and 'estates above disponed are and shall be burdened, in real war-'randice, with the payment of any augmentation of stipend that 'shall at any time hereafter be imposed upon the lands and estate 'of Crichton in terms of the clause of absolute warrandice con-'tained in a disposition by the said Mr. James Justice to Mark 'Pringle, Esq. of Crichton, dated the 14th day of July 1738, 'and with power to the said Mr. James Justice, for the said 'Mark Pringle, his heirs and successors, their further security, 'to grant them an heritable security and infeftment of warran-'dice upon the said lands against the said future augmentations.'

No such clause, however, was introduced into the titles of Over Howden. James Justice was accordingly infeft both in Ugston and Over Howden in fee; and he granted an heritable bond of warrandice over the former, confirming the former obligation, and binding and obliging himself, and his 'heirs and successors what-'soever, not only to warrant, acquit, and defend the said Mark 'Pringle and his foresaids, from all ministers' stipends, future 'augmentations, and other burdens of whatsomever nature im-'posed or that shall be imposed upon the said teinds, parsonage 'or vicarage, of the said lands and barony of Crichton, except-'ing the said ten bolls of bear and fifteen bolls of meal, and '£466: 13: 4 Scotch, being the stipend presently payable out of 'the foresaid teinds to the minister of the parish of Crichton; 'but also, in case of any eviction of the foresaid teinds beyond 'the said stipend presently payable, to content and pay to the 'said Mark Pringle and his foresaids such sums as shall be equal 'and amount to twenty-four years purchase of every such evic-'tion, and that at the term of Whitsunday and Martinmas at 'which such augmentation shall commence, or other burden be 'imposed, respectively.'

On this bond Mr. Pringle was infeft.

James Justice possessed under the above titles in liferent till his death in 1763; and his son Alexander being also dead, his surviving son James (second) made up titles to Alexander, and was infeft.

The minister of Crichton having obtained several augmentations, which were allocated upon the estate, the lands of Ugston were adjudged in relief. Thereafter the pursuer Miss Justice having succeeded to her father James (second) as heir of the

estate of Over Howden, and the defender Mr. Callender having acquired right to the estate of Crichton, and several additional augmentations having been granted, he obtained in absence a decreet of adjudication, in virtue of the clause of warrandice against the estate of Over Howden.

Of this decree Miss Justice brought a reduction; in which she contended,

1. That as James Justice, by whom the obligation of warrandice was granted, was a mere liferenter, and as she had not made up titles to him, and did not represent him, she was not bound by his obligation; and,

2. That although the titles had been taken by him to himself in liferent, and to his son in fee, no passive title was incurred by the son accepting of such a right, and therefore none could be imposed on her by taking the estate as the successor of that son.

To this it was answered, That the lands of Over Howden had been bought with the price which had been paid by Mr. Pringle in consideration of the sale of the estate of Crichton, and of the obligation of warrandice; that it was not in the power of James Justice, by taking the titles to himself in liferent, to prevent these lands being attached for implement of his obligation; and that Miss Justice could not take them free from such claim, and without representing him.

The Lord Ordinary repelled the reasons of reduction, and the Court adhered.

Lord Craigie.—The interlocutor is quite right. The obligation is effectual, and the lands must be liable in relief to the defender. I do not go upon the passive title of perceptio hæreditatis, but that it was impossible for the pursuer to take these lands, and not be subject to the burden of the obligation.

Lord Balgray.—I am of the same opinion. The lands were purchased with the very money which was paid in consideration of the obligation by James Justice. He, no doubt, took the titles in favour of his son in fee, but he could not thereby remove them from liability for implement of this obligation.

Lord Gillies.—This is not a question of passive title; and, to simplify the case, suppose that it had arisen during the life of Alexander Justice, the fiar: Could he have disputed that the lands were liable to be attached for this debt? Assuredly not; and if not, neither can the pursuer.

Lord President.—I am of the same opinion; and although at first sight this may appear a hard case, yet in truth it is not so. If the full price for the teinds had not been paid, there would have been no money with which to purchase these lands; and as the de-

fender has been called on to pay these augmentations, it is perfectly just that he should be allowed to attach the lands which were purchased with the money paid for these teinds.

Pursuer's Authorities.—3. Stair, 7. 7; 3. Ersk. 8. 92; 3. Bank, 7. 3.
Defender's Authorities.—3. Stair, 7. 7; 3. Bank, 7. 3; Elliot, Nov. 16. 1698, (9782.)

J. and W. JOLLIE, W. S.—A. DALLAS, W. S.—Agents.

No. 49.

D. M'NEILL, Pursuer.—*M'Neill.*
Lieut.-Col. M'NEILL, Defender.—*Baird.*

Dec. 1. 1826.
2D DIVISION.
Ld. Cringletie.
B.

THIS was an action of count and reckoning, in which, after considerable procedure before the Lord Ordinary, the Court remitted to an accountant; and he having reported that there was a balance due to the defender of £780, or of £757, according as certain legal principles maintained by the one party or the other were adopted, the Court, of consent, divided the difference, and remitted to the Lord Ordinary to determine as to expenses.

J. BROWN, W. S.—J. and W. FERRIER, W. S.—Agents.

No. 50.

W. and J. RAMSAY, Suspenders.—*Donald.*
J. M'LEISH, Charger.—*Neaves.*

Dec. 2. 1826.
1ST DIVISION.
Bill-Chamber.
Lord Medwyn.

L. O. refused a bill of suspension of a decree of the Sheriff of Edinburgh under special circumstances, and the Court adhered.

R. CAIRNS,—J. GRAY, W. S.—Agents.

No. 51.

J. SPENCE.—*Jeffrey—D. Macfarlane.*
J. EADIE.—*Skene—Buchanan.*

Competing.

Sequestration—Trustee—Process.—Held,—1.—That it is not a valid objection to a candidate for the office of trustee on a sequestrated estate, that his partner in business is trustee on the estate of a party against whom it is alleged claims exist, and that he is cautioner for his partner;—and,—2.—That it is a good personal objection against a candidate for the office that he resides in Edinburgh, and that the sequestrated estate is in Glasgow.—Question raised, whether competent to prepare a cause of new after the record is closed.

Dec. 2. 1826.
1ST DIVISION.
Lord Medwyn.
H.

THE estate of John M'Luckie, plasterer in Glasgow, was sequestrated in 1806; and, after some intermediate trustees, James Watson was appointed to that office, and had considerable intromissions with the funds. In consequence of his bankruptcy, and the sequestration of his estates, Watson was removed; and a com-

petition then arose for it between Eadie, who resided in Glasgow, and Spence, accountant in Edinburgh.

At a meeting of the creditors for electing a trustee, it was objected by Spence, That as Eadie was the partner of a Mr. Miller who had been appointed trustee on the estate of Watson, and was his cautioner; and as that of M'Luckie had claims against Watson, which would require much discussion; and as Eadie and Miller must be considered as identified in point of interest, he was not eligible to the office.

To this it was answered, That they were not in partnership as trustees, but only as agents and accountants, and that there was no such connexion between them as to prevent him from doing his duty.

On the other hand Eadie objected, That as the estate was situated in Glasgow, and the creditors resided there, and as Spence resided in Edinburgh, he was not entitled to hold the office.

In answer to this Spence pleaded, That his residence in Edinburgh was not a personal objection, but resolved merely into a question of expediency, of which the creditors alone were the proper judges; and that in this case there was no inexpediency.

Both competitors having been elected by different parties of creditors, and disputes having arisen as to which of them had the majority of votes, and each of them having presented petitions for confirmation, the case was remitted to the Lord Ordinary to prepare the cause. Condescendences, both as to the personal objections, and as to the objections to the votes, and relative notes of pleas in law, were prepared, and the record closed; and the Lord Ordinary thereupon reported the case to the Court, stating that he was of opinion that the personal objection against Eadie ought to be sustained. The Court, however, again remitted the case to his Lordship, to prepare the cause in relation to the personal objections alone; in consequence of which he appointed that part of the record to be printed, and thereupon reported the question on Cases, accompanied with this note:—'The 'Lord Ordinary, when this competition was originally before 'him, conceived that the record was so full, that the Court 'would be enabled easily to dispose of the personal objections 'without Cases; and he gave his opinion merely, and not a judg-'ment, on the point, by which means the party who, as he con-'ceived, should be preferred, had it in his power to carry the 'case immediately to the Inner House; and thus a trustee might 'have been confirmed this session, which seemed a very desirable 'object for the estate at present, in consequence of the former 'trustee having been dismissed, not being under any interim 'management whatever. The Court, however, having remitted

'the case again to prepare and proceed in the cause in terms of 'the act of Parliament, by which it is supposed the act of sede- 'runt is meant, without any further instructions, the Lord Ordi- 'nary was of opinion that he had no power to touch the record 'already made up; and that all he could do was to direct those 'parts of it which relate to the personal objections to be printed 'separately—a suggestion which he formerly made to the parties, 'but which he did not think he had any power to enforce. As 'he sees no advantage in disposing of the personal objections 'himself, which would certainly not be acquiesced in, so that the 'Court could not confirm the trustee this session, even should 'they concur in the opinion of the Lord Ordinary, he has thought 'it best to report the cause; and when he does so, he is bound to 'appoint Cases, in terms of section 22d of the act of sederunt '12th November 1825.'

Before the case was advised, Miller had obtained a discharge as trustee on Watson's estate; and Eadie thereupon contended, that even if the objection against his eligibility had been well founded, it was thereby obviated. To this Spence answered, That as there was no mention of that circumstance in the record, and no leave had been obtained to enter it as res noviter, it could not be listened to; and even if it could, still the question must be judged of as at the date of the meeting. The Court, after being equally divided, and taking time to consider, 'repelled the 'personal objection stated to the petitioner John Eadie being con- 'firmed trustee, and refused the desire of the petition for John 'Spence, and sustained the personal objection stated to him; and 'confirmed the petitioner John Eadie's nomination as trustee on 'the sequestrated estate within mentioned.'

CAMPBELL and BURNSIDE, W. S.—J. GREIG, W. S.—Agents.

No. 52. Sir A. C. MAITLAND GIBSON, Bart. and Others, Advocators.—*Skene—Gibson-Craig.*
J. WILLS, Respondent.—*Whigham.*

Arrestment.—Held that the arrester is in no better situation than the common debtor, and that he cannot recover where the common debtor could not do so.

Dec. 2. 1826.
1ST DIVISION.
Lord Eldin.
D.

ON the 19th of March 1823, William and Andrew M'Ewan granted a bill to Wills for £20, payable two months after date, which they failed to pay. On the 1st of October 1823, Sir Maitland Gibson and others, as trustees on the Corstorphine district of roads in the county of Edinburgh, entered into a contract with them for making a piece of road, by which the trustees bound themselves 'to content and pay to the said William and Andrew

'M'Ewan, their respective heirs, executors, or assignees, the sum 'of £1000 sterling, and that quarterly, in the proportions fol- 'lowing; viz. the sum of £250 on the first Wednesday of the 'month of January next,—the like sum of £250 on the 1st of 'April thereafter,—the like sum of £250 on the first Wednesday 'of July thereafter,—and the balance of the said contract-money 'on the first Wednesday after the said work is completely fin- 'ished, in terms of this contract, and taken off the hands of the 'contractors as such by the said trustees.' On the other hand, the M'Ewans came under an obligation 'that the whole work 'was to be done agreeably to the plan and section aforesaid, and 'what is herein specified, in a complete, substantial, and workman- 'like manner, and to the satisfaction of the said Sir Alexander 'Charles Maitland Gibson, Baronet, or whom he and the other 'trustees may appoint to inspect the work; and the whole to be 'completely finished by the 1st day of October in the year 1824, 'under the penalty of £100 sterling.'

Immediately thereafter M'Ewans began to execute the work; and on the 19th of December they had performed work to a greater value than the amount of the debt due to Wills, who, of that date, executed an arrestment in the hands of the trustees. The M'Ewans, however, were unable to proceed with the work, and in consequence the trustees were obliged to employ people to do so; and the money agreed to be paid to M'Ewans was laid out at the sight of the trustees in executing the work. Wills then brought an action of forthcoming against them before the Sheriff of Edinburgh, and contended that as, at the date of the arrestment, the trustees were indebted to the M'Ewans in a sum exceeding £20, he was entitled to recover it from them. To this it was answered, That although work to that extent had been performed, yet no such sum was due; and that so far from the trustees being debtors of M'Ewans, they were creditors of them in consequence of their failure to perform the contract.

The Sheriff having decerned against the trustees, they brought an advocation, in which the Lord Ordinary assoilzied them, and the Court adhered.

The Court held that the arrester could be in no better situation than the common debtors; and as they could not have insisted for payment from the arrestees, it was impossible that the arrester could do so.

Advocators' Authority.—3. Ersk. 6. 16.

Respondent's Authorities.—Corse, Jan. 31. 1705, (757); Pender, May 27. 1824, (ante, Vol. III. No. 47.)

A. MAITLAND, W. S.—J. MACANDREW,—Agents.

No. 53. J. KING and Others, Pursuers.—*Greenshields.*
J. KING and Others, Defenders.—*Sol.-Gen. Hope.*

Dec. 5. 1826.
1ST DIVISION.
Lord Eldin.
D.

THE Lord Ordinary having assoilzied certain parties who were sued upon the passive titles, the Court remitted to him to inquire into the facts.

CAMPBELL and MACK, W. S.—W. A. MARTIN, W. S.—Agents.

No. 54. C. MACKIE, Suspender.—*Brownlee.*
HARVEY, HALL, and COMPANY, Chargers.—*Jameson—Moir.*

Legal Diligence—Cessio Bonorum.—A party having conveyed all his property in trust for behoof of his creditors, under which it was distributed among them, and having obtained decree of cessio, and executed the requisite disposition, and horning having thereafter been used against him on a debt prior to the cessio—Held,—1.—That he was not entitled to suspend on the ground that there had been no discussion under the disposition omnium bonorum in the cessio, it not being alleged that he had acquired any funds subsequent to the date of the trust-deed;—but,—2.—That he was warranted in bringing a suspension as to personal diligence, there being nothing on the face of the charge to show that the creditor was to restrict his diligence to poinding.

Dec. 5. 1826.
2D DIVISION.
Bill-Chamber.
Lord Medwyn.
B.

MACKIE, having been incarcerated a short time after executing a trust-disposition of all his property for behoof of his creditors, raised a cessio, in which he obtained decree, and granted the usual disposition omnium bonorum. About a year afterwards, he was charged on letters of horning, for payment of a debt incurred prior to the decree of cessio, by Harvey, Hall, and Company, who were proceeding to poind certain effects which they alleged to be his. He thereupon presented a bill of suspension, on the grounds,—1. That the decree of cessio secured him from personal diligence;—and, 2. That a creditor, prior to the cessio, could not attach his effects, without showing that all the funds falling under the disposition omnium bonorum had been exhausted. Harvey, Hall, and Company produced a state, showing that under the voluntary trust-deed the suspender's whole funds had been distributed among his creditors, for the dividend of which they gave deduction; and they contended that this was sufficient, as he did not allege that he had any funds whatever to be conveyed by the disposition in the cessio. The Lord Ordinary passed the bill so far as respected personal diligence, but refused it quoad ultra, and found the suspender liable in expenses. The Court adhered, but allowed a modification of the expenses, on the ground that the suspender was entitled to be completely protected

against the risk of personal diligence; and although the chargers alleged that they had communicated to him that the only object of the horning was to enable them to use the diligence of arrestment and poinding, yet nothing appeared on the face of the charge to give him an assurance that personal diligence was not to be proceeded with.

P. Couper, W. S.—A. Donald, W. S.—Agents.

J. Hamilton, Advocator.—*Skene—Maidment.* No. 55.
Durie's Trustees, Respondents.—*Cockburn.*

Process.—Incompetent to hold copies of a summons and interlocutors which had been lost equivalent to the originals, except by consent of both parties.

Dec. 5. 1826.
2d Division.
Lord Mackenzie.
M'K.

Hamilton having brought an advocation of an action instituted against him by Durie's trustees before the Judge Admiral, of which the original summons and interlocutors (as he alleged) had been lost, produced copies, which he offered to hold as a sufficient warrant to the clerks to extract. The respondents, however, refused to concur with him in holding them to supply the place of the originals; and the Lord Ordinary thereupon, 'in respect of the refusal of the respondents to concur in the proposal 'of the advocator,' sisted the process, to give time for proving the tenor of the summons and interlocutors. Hamilton then reclaimed, and contended that if he, the defender, agreed to hold the copies produced as the originals, so that the pursuers might obtain an extract of their decree, that was all they could reasonably demand, and that they were not entitled to withhold their concurrence; but the Court unanimously refused his reclaiming note.

J. J. Fraser, W. S.—A. Snoddy,—Agents.

J. Howie, Petitioner.—*Forsyth.* No. 56.

Dec. 5. 1826.
2d Division.
M'K.

Curator Bonis.—In a petition for the appointment of a curator bonis to an old man in a state of mental imbecility from paralysis, authority was craved for raising an action of reduction of a deed alleged to have been executed on deathbed in prejudice of this person, who was heir at law of the deceased. The Court appointed the curator, but declined to grant any specific authority for raising the action.

J. Stuart,—Agent.

No. 57. Y. TROTTER, Pursuer.—*Sol.-Gen. Hope—Anderson.*
W. TROTTER and Others, Defenders.—*D. of F. Moncreiff—Skene.*

Foreign—Testament.—A native of Scotland, who was domiciled in India, but part of whose property was vested in heritable bonds in Scotland, having executed a will in India, which was not effectual to carry the heritable bonds; and a question having arisen, whether his heir at law, who claimed the heritable bonds as heir, was also entitled to claim a share of moveables under the will—Held, that the construction of the will as to whether it expressed an intention to carry the Scotch heritage, and the legal consequence of that construction, must be determined by the law of England.

Dec. 5. 1826.
2D DIVISION.
Lord Pitmilly.
M'K.

THE late Colonel Charles Trotter, a native of Scotland, and one of a family of six children, having gone to India in the service of the Company, and realized some fortune there, wrote, in 1809, to his brother William (who resided in Edinburgh,) in the following terms:—'I will probably send from time to time 'money home, and I have at this present moment written to Bom-'bay for bills of exchange for 3000 rs., which I will make pay-'able to you. This sum, or any other I may send from time to 'time, you can lodge in the Bank of Scotland, or in other safe 'security, until my arrival, if it please God I ever should return 'home; otherwise it will do to divide amongst you all, agreeably 'to our dear father's wise and just system of disposing of his for-'tune.' Colonel Trotter accordingly at different times remitted further sums, which he directed to be lodged in the Bank, 'and 'in no other place,' frequently repeating his resolution, that if he did not return home, it should be divided amongst all the family. Instead of lodging the money in the Bank, Mr. William Trotter deemed it more advisable to lay it out on heritable security; and he accordingly invested what had been remitted on three bonds, two of which were heritable, and the other personal, but secluding executors. At this period Colonel Trotter's heir of conquest was his immediate elder brother, General Thomas Trotter. His heir of line, who would as such have succeeded to the bond secluding executors, was his immediate younger brother, the pursuer, Young Trotter, from whom a declaration was taken, at the recommendation of the family agents, and addressed to them, setting forth that he had been informed that the money appointed by Colonel Trotter to be lodged in the Bank had been lent out on bonds, whereby it would 'probably fall to be distri-'buted differently from his intentions,' and proceeding,—'Now, 'as I know my brother's intention was, that his estate should, in 'the event of his death, be distributed on the same principle with

'that of our father's, or equally amongst his brothers and sisters, 'I hereby, for my interest, engage to co-operate in effecting such 'a distribution, should my brother Charles die without making 'any other valid arrangement and settlement of his affairs.' This declaration remained in the hands of the family agents; but General Trotter, the heir of conquest, did not grant any similar declaration on his part, and Colonel Trotter was himself subsequently informed of the manner in which his money had been invested, although it did not appear that he was made acquainted with the change which it would effect in the legal order of his succession.

Colonel Trotter not only did not express any dissatisfaction at this deviation from his directions, but in 1815, when it became necessary to discharge one of the bonds, he executed a power of attorney, which had been prepared in this country, and which expressly mentioned the several bonds, whereby he empowered Mr. William Trotter to uplift the sums in these bonds, 'and to rein-'vest and re-employ the sums so received, or any other funds 'that I may hereafter commit to his charge, on such similar good 'heritable security, or personal security, as he may approve of.'

Under authority of this power of attorney, the money lent on the bond secluding executors and one of the heritable bonds were uplifted, and a sum of nearly similar amount was lent on heritable bonds to the pursuer Young Trotter, and in this state the funds remained at Colonel Trotter's death in June 1819. A few days prior to this event, which happened at a remote station in India, Colonel Trotter executed a will, whereby, after narrating that he considered it his duty to make a settlement of all the estate and effects which might belong to him at his death, he appointed his brothers William and Young to be his executors in Great Britain, and certain persons to be his executors in India, under directions, that after payment of certain legacies, they should remit the residue to his executors 'in Europe,' who were instructed by the deed 'to divide the remainder of my estate, as they receive 'it from India, and the whole of my property in Europe, into 'six equal shares,' to be paid to each of his brothers and sisters, and the husband of one of the latter.

In the March preceding General Thomas Trotter had died, so that Young Trotter, as the immediate younger brother of the deceased, had thus become his sole heir in heritage; and having served heir accordingly, he, as such, claimed the heritable bonds, and likewise an equal share of the residue of Colonel Trotter's moveable estate under the will. This was opposed on the part of the legatees, on the ground, that it being the intention of the tes-

tator, as expressed in his will, (though not in technical terms sufficient to carry that intention into effect,) that his whole property, heritable and moveable, should be divided equally among the legatees, the heir could not both take under the will his share of personal estate, and the heritable bonds as heir at law,—thus approbating and reprobating the latter will.

To have his rights determined, Young Trotter raised an action against William Trotter, concluding for exhibition of the titles, &c. connected with the real debts of the deceased, and that, when produced, they should be ordained 'to be delivered up to the 'pursuer as his own proper writs and evidents, and that without 'the forfeiture of any part of the legacy left to him by the afore-'said latter will and testament of the said Charles Trotter, and 'without being obliged to collate the heritage, or any part of it, 'with the personal estate.' A multiplepoinding was also raised in name of the executors in this country, in which Young Trotter claimed his equal share of the personal estate under the will, and also the heritable bonds above mentioned; while the other legatees claimed their equal shares of the whole property of the deceased, including these bonds; or (if the heir refused to collate) of the whole personal estate, excluding him from any share.

It was admitted on both sides that the settlement was not effectual to carry the heritable bonds, and that the point, whether the heir could take a share of moveables under the will, without complying with the intention of the testator as to heritage, depended on the English law of election, which, however, was the same with our rule of approbate and reprobate; but the question came to be, Whether the testator had expressed an intention to convey the heritage, and whether, as to this, the will should be construed according to the law of England, or that of Scotland?

The processes above mentioned having been conjoined, the Lord Ordinary assoilzied from the declaratory conclusions of the action of exhibition and delivery, and in the multiplepoinding preferred the legatees to the fund in medio, in terms of their claim.

Against this interlocutor Young Trotter reclaimed, and the Court, before answer, appointed a Case to be laid before English counsel (a Chancery and a Common lawyer) for their opinion on the following queries:—

1. Whether the will would be held sufficient to pass real property by the law of England?

2. If it would not be held sufficient for that purpose, what are the particular grounds on which it would be considered in England insufficient for that purpose?

3. If the will be not sufficient to pass real property, does it so

express the testator's intention that it would put the heir to his election in any competent Court in England, whether of law or equity, if he had claimed the English real property, as well as his share of the personal estate under the will?

4. If the words of the will are so defective in form and in meaning, according to the construction of such words by the law of Scotland, that they do not express it to be the meaning of the testator to pass heritable rights in Scotland, would the heir be put to his election in any competent Court, whether of law or equity, in England, were the question to arise there?

5. Taking into consideration the relative circumstances under which the heritable bonds were severally granted, with reference both to the time of Colonel Trotter's death, and to the authority under which they were heritably invested by his attorney, does the same general principle apply equally to all of them?

6. What would be the determination of any Court of Law or Equity in England in regard to heritable or real property vested by the attorney under circumstances which left Colonel Trotter in ignorance that the money was so vested at the time he made his will, and when he died? Would the heir, with regard to such real subjects, be put to his election?

7. On the other hand, what effect would be given to the circumstance, that an heritable or real security, which Colonel Trotter had previously approved of, and which exceeded in amount the new investments alluded to in the preceding query, had been uplifted by his attorney under circumstances which left Colonel Trotter in ignorance that the money had been so uplifted at the time he made his will, and when he died? Would that circumstance affect the heir's obligation to elect as to the posterior real investments alluded to in the preceding query?

8. Whether, on the supposition of the question having arisen for trial in England, the heir would have been put to his election, if he had claimed money secured by heritable bonds in Scotland, as well as his share of the personal estate under the will?

To these queries the following answers were returned:—

1. We are of opinion that the will would not be held sufficient by the law of England to pass real, that is, freehold property.

2. Because it is not attested by three witnesses in the manner required by the Statute of Frauds.

3. We are also of opinion that the will does not so express the testator's intention as to the freehold property, as that it would put the heir to his election in a Court of Equity in England, if the heir had claimed the English freehold property, as well as his share of the personal estate under the will.

4. Upon the supposition which is put in the fourth question, we think that the heir would not be put to his election in any competent Court in England, either of Law or Equity, were the question to arise there.

5. We are of opinion that the same general principle applies equally to all the bonds.

6. We are of opinion that though Colonel Trotter might be in ignorance that his money was vested in heritable property at the times when he made his will and when he died; yet, as the power of attorney authorized an investment in heritable security, the heir would not, with regard to such real subjects, be put to his election; but that, notwithstanding Colonel Trotter's ignorance of the actual mode of investments, the heritable or freehold property would, in any Court of Law or Equity, be deemed such as it actually was at the death of the Colonel.

7. We are of opinion that if an heritable or real security, which Colonel Trotter had previously approved of, and which exceeded in amount the new investment alluded to, had been uplifted by his attorney under circumstances which left Colonel Trotter in ignorance that the money had been so uplifted at the times when he made his will and when he died, that circumstance would not affect the heir's obligation to elect as to any posterior real investments alluded to in the sixth query. But having regard to the terms of the power of attorney, whether the Colonel's property was money in the hands of his attorney, or heritable security, it must, as between his heir and executor, be taken to be such as it in fact was at the time of the Colonel's death.

8. Considering heritable bonds in Scotland as real estate, to which the heir at law is entitled, unless they are conveyed away by his ancestor with due solemnities, we think the heir at law would be entitled in this case to claim them without being put to his election, if the question had arisen in a Court of Justice in England.

On receiving this opinion, the Court altered the Lord Ordinary's interlocutor, and found that the pursuer 'is entitled to 'the legacy left to him by the will out of the personal estate, 'without being obliged to collate any part of the sums secured 'by heritable bonds, to which he is entitled to succeed as heir;' and therefore in the multiplepoinding preferred him in terms of his claim, and in the action of exhibition and delivery decerned in terms of the libel. The legatees having reclaimed, the Court ordered Cases, in which it was contended by them, That there being no dispute that by the law of England, as by that of Scotland, an heir could not take benefit by a will while

he contravened the intention of the testator expressed in it, though not technically carried into effect, the only point to be determined was one of fact, viz. Whether the testator did intend to include in the settlement of his affairs his Scotch heritable bonds? — That this depended not on any technical construction of the terms used, which could only be properly resorted to in considering whether the terms were legally sufficient to carry the intention into effect, but on the common sense and colloquial meaning of the language employed, which, in the present case, showed a clear intention on the part of the testator of including under his settlement all his real property, wherever situated; so that there was no necessity for having recourse to the opinion of English lawyers, which could be no guide on such a question, the more especially as the law of England had particular technical rules of construing intention, according as the property, supposed to be had in view, was freehold or copyhold, and as there was no species of property known in England corresponding to our heritable bonds. It was further argued, that if technical construction was to be resorted to at all, it ought to be that of the law of the country where the real property was situated, regarding which the question arose; and several authorities to this effect were appealed to, particularly an unreported case of Martin *v.* Martin, Stone and Foote, very similar to the present, in which this Court, and afterwards the House of Peers, affirmed a judgment of the Lord Ordinary, whereby, in regard to certain adjudications claimed by an heir who had taken benefit by an English will conveying all the testator's 'real and personal estate whatever,' his Lordship found, 'that 'the words of the will are sufficiently broad to carry the adjudi-'cations in question; and although that will does not contain 'words sufficient to convey feudal property by the law of Scot-'land, and that it is not authenticated in terms of the statute '1681, yet in respect Thomas Martin, the pursuer, has taken 'benefit under the will, finds that he is not entitled to appro-'bate and reprobate the same deed.'

On the other hand, it was pleaded for the heir, That although, in determining the effect of terms used in a will in relation to real property, as to whether they were legally sufficient to carry such property, it was necessary to construe them by the law of the country where the property lay, every country having peculiar technical rules regarding the transmission of real estate; yet, in ascertaining the intention of a party, as expressed in his will, the true rule of construction was according to the law of the country of his domicile, the legal language of which he was held to

speak, and that such construction was therefore matter of law, which, being here a question of foreign law, could only be determined by the opinion of foreign lawyers; and the opinion obtained in reference to this case being clear and explicit, that there was no such intention expressed in the will to convey the heritable bonds as would put the heir to his election in England, there was no room for any discussion in this Court as to what was the real intention of the testator. In support of this plea, reference was particularly made to the case of Robertson *v.* Robertson in 1816; and in regard to the case of Martin it was observed, that the right to the adjudications there in question had not been feudalized in the person of the testator, and were consequently personal property.

The Court, by a majority, adhered to their former interlocutor.

LORD JUSTICE-CLERK.—This is a case of much importance, and it has been very well argued in the Cases. I remain, however, of opinion that the course we adopted of requiring the opinion of English lawyers is that which we are bound to take in deciding cases like this, having reference to the meaning of English deeds. Our former erroneous course of judging of English deeds without such assistance was corrected by the reversal of the decisions of the Court in the cases of Dundas, of Wilson, and of Douglas; shortly after which the course was adopted which has properly been followed here. The opinions which have been obtained in this case are quite decisive, and must be taken as matter of fact; though it is satisfactory to observe, that they are almost in the same terms with those obtained in the case of Robertson. As to the case of Martin, so particularly referred to by the legatees, I have looked into the notes of Lord Meadowbank, and I see that President Campbell held that the adjudications there were moveable property; and it is clear that they were so. This, therefore, forms a remarkable specialty in that case, which cannot be received as a precedent.

LORD PITMILLY.—I cannot deny that I have felt a strong disposition to return to my original interlocutor; but I have found it impossible to do so. This case must hinge entirely on the question, whether or not we are to be guided by English law, which is strictly matter of fact in this Court. Had it been urged in the Outer House, I should have taken the course since adopted of requiring the opinion of English lawyers; and I am now satisfied that it is necessary to decide the case by their opinion. Young Trotter takes the heritable bonds as heir at law, not under the will, but because they are not carried by the will; and that is a point of Scotch law as to what is sufficient to carry Scotch heritage, which we must determine. But he also claims under the English will a share of the moveables; and the succession under it must be regulated by the lex

domicilii. It therefore becomes a question of English law, whether he is to take under the will, subject to election or not; and if he is cut out from a share of the moveables, it must be in virtue of the English rule of election, and not of our rule of approbate and reprobate. We cannot put him to his election till it be determined that the testator has intended to put him to his election; and it is no answer to say that the testator's intention is a question of fact, for it depends on the legal construction of the will, and is thus a very nice question of English law, which this Court cannot determine of themselves, but it must have recourse to the opinions of English lawyers; and those received here leave no room to doubt of the result.

LORD ALLOWAY.—The late Colonel Trotter, though born in Scotland, was certainly a domiciled Englishman; and so far, therefore, as his moveable succession is concerned, it must be regulated by the law of England. The succession to the heritage, on the other hand, falls to be ruled by the lex rei sitæ. In every country there is some equitable rule to attain the ends of justice, when a settlement is not so expressed as to carry heritage according to the law of the country where it is situated, although it may have been the intention of the testator to do so. This equitable rule is carried into effect in Scotland by the doctrine of approbate and reprobate, and in England by the law of election, which are exactly the same in principle, both depending on this—what was the will of the testator. I perfectly agree with the opinion of the English counsel consulted here, that the heir is entitled to take under the settlement, and also as heir at law, if it was not the intention of the testator to dispose of the heritable property by that settlement; and so far I think it right to follow the English law, which however agrees with our own. But when we come to ascertain what was the intention of the deceased, I conceive that we are entitled to throw out of view the technicalities of the English law, which seem in a great measure to depend on whether the property be freehold and copyhold, and whether there be two or three witnesses, and to judge of the intention for ourselves. The will here is a military testament, and no technical language is used in it. I know it cannot carry the real estate; but the intention to do so is clear. All I ask is, to construe the will according to the fair colloquial meaning of the language; and in this view the intention to settle his whole estate in Scotland, as well as elsewhere, is evident; and still more so, when his previous correspondence, and the declaration of the heirs, are taken into consideration. Such being his intention, we are warranted, following out the English rule of election, to return to the Lord Ordinary's interlocutor.

LORD GLENLEE.—This is not a question as to heritable succession, but only as to what effect Young Trotter's taking the heritage is to have on the moveable succession under the will. Now, suppose that there had been no settlement at all, whether the heir had a claim to

a share of the moveables without collating would have been a question of English law solely. In the same way as to testamentary succession, when the question is, in what respect the moveable succession is affected by a particular act, we must go to the law of the domicile. It is said that we must attend chiefly to intention; and I can conceive cases where the expression of will is so explicit, that it would scarcely be necessary to apply to English lawyers; but whenever we come to infer intention, we must have recourse to English law. If it were not for extrinsic circumstances, I am not clear that there is any such necessary presumption of an intention to convey the bonds as is taken for granted by the legatees. Of all cases, therefore, this is the most fit to go to the law of England; and I am not sure but that it is even more favourable for the defenders to have recourse to that law than to our own. We must judge, however, by the law of England, whether the heir would have been put to his election there; and as we see by the opinions that he would not, we cannot enforce our doctrine of approbate and reprobate.

Pursuer's Authorities.—Voet. lib. 1. t. 1. § 19, lib. 23. t. 2. § 85, and lib. 28. t. 5. § 16; Dundas, Feb. 25. 1783, (15585); Henderson, Jan. 31. 1797, (15444), as reversed in H. of L. May 29. 1802; Bingham, Feb. 7. 1794, as reversed in H. of L. March 18. 1796; Wightman, June 14. 1802, (F. C.); Robertson, Feb. 16. 1816, (F. C.); Hay Balfour, March 11. 1793, (F. C.) as reversed in H. of L.

Defenders' Authorities.—Voet. lib. 23. t. 2. § 85, and lib. 28. t. 5. § 16-144; Lamb, March 11. 1624, (4812); Henderson's Children, Dec. 9. 1623, (4481); Dictum of Sir W. Grant in Brodie *v.* Barry, (2. Vesey and Beames, 127); Ross, Jan. 20. 1797, (F. C.); Robertsons, May 25. 1812, (F. C.); Gibson, June 20. 1786, (620); Martin, March 4. 1794, affirmed in H. of L. (not rep.)

CRANSTOUN and ANDERSON, W. S.—GEO. VEITCH, W. S.—Agents.

No. 58.

C. CAMPBELL, Pursuer.—*D. of F. Moncreiff—Cuninghame.*
A. ANDERSON, Defender.—*Jeffrey—Matheson.*

Mandatory—Factor.—Held that a factor or mandatory is entitled to act until he receives authentic information of the death of his constituent.

Dec. 7. 1826.
1st DIVISION.
Lord Medwyn.
D.

THE late Robert Gordon was proprietor of Draikies near Inverness, and also of estates in the West Indies. Having been obliged to go thither, he granted a factory for the management of Draikies in favour of the defender, with power, inter alia, 'to 'borrow such sum or sums of money as he may think proper on 'my account, to the extent of £5000 sterling; and, for the pur-'poses foresaid, to grant, subscribe, and deliver bonds, obliga-'tions, and other writs necessary as factor foresaid, and therein 'to bind and oblige me, as his constituent, to grant heritable se-

'curity for such sums of money as he may so borrow upon my 'return to Great Britain; as also, for me and in my name, to 'grant, subscribe, and deliver all foreign or inland bills which 'may happen to be drawn on me during my absence, in so far 'as the same shall appear to be justly due by me; and likewise 'to draw bills or other drafts in my name, and on my account, on 'such commercial houses as I have, or hereafter may happen to 'have, dealings with.' Mr. Gordon was in the practice of consigning his West Indian produce to Campbells, Fraser, and Company, merchants in Glasgow, of which firm the pursuer was now the sole representative; and the defender was authorized to draw upon them when necessary. On the 28th of October 1809, the defender wrote to the pursuer, stating that Mr. Gordon, 'in his 'last to me of the 24th July, advises his draft on your house for '£150, and his intention of avoiding to value further on you 'until he can ship produce to your address, which I trust he will 'be able to accomplish, as his purposes here would require an 'accommodation of £500 on the 11th proximo, being our Mar-'tinmas term. I have advised him of my intention of soliciting 'your house to this extent; and if you permit me to draw on 'you at three months for the same, be so good as acquaint him 'therewith per the Harmony, that he may have the earliest 'knowledge of this addition to his engagements with you, and 'provide accordingly.' In answer, the pursuer, on the 4th of November, wrote to the defender, that 'your draft on Campbells, 'Fraser, and Company, will meet honour to the extent you men-'tion; and should remittances not be received, and that they re-'quire it, you can reimburse them in some shape until the crop 'comes round.' In consequence of this authority, the defender drew a bill upon Campbells, Fraser, and Company for £500, payable three months after date to John Fraser, agent at Inverness for the Bank of Scotland. This bill was subscribed thus, 'Per procuration of Robert Gordon, Alexander Anderson;' and he immediately intimated to Campbells, Fraser, and Company that he had drawn the bill, subscribing his letter in the same manner. At the same time he wrote to the pursuer, in his own name, this letter:—'Agreeably to your permission, I have this day drawn 'on your house, as per prefixed letter of advice, for £500 at three 'months, to complete Mr. Gordon's arrangements at this term; 'and, by the time it falls due, I trust you will be in possession 'of produce to meet it, or that it can be otherwise provided for 'should you find it necessary.'

The proceeds of this bill were applied by him to the use of the estate of Draikies; and on the 22d of the same month he wrote

to the pursuer, that 'I have just received a letter from Mr. Louis 'Cameron of Berbice, dated 27th August, communicating the 'death of our worthy friend Mr. Gordon on the 24th of the 'same month,—an event as distressing as it was unexpected. 'About a month ago, a report of this circumstance was circulated 'here; but as it came from no authority, and similar stories hav- 'ing been handed about on former occasions, his friends expe- 'rienced no uneasiness, particularly as the Hawk, that sailed 'from Demerara on the 14th September, and arrived in the 'Clyde on the 28th October, brought no such intelligence.'

Campbells, Fraser, and Company, in consequence of this event, and of being under large advances for Mr. Gordon, refused to accept the bill; but an action having been afterwards raised against them, founding upon it and the relative letter, the Court decerned against them for the amount, and in consequence the bill was paid and delivered.* In the mean while the West Indian produce continued to be consigned to that company, and in consequence they were enabled to get their debt paid off; but they did not include the amount of the bill as a charge against the consignments, as they conceived that they were not liable for it.

After decree had been pronounced, and the bill delivered up, the pursuer, as representing Campbells, Fraser, and Company, brought an action against the defender, in which he concluded for reduction of the bill, and at all events for repetition of the amount.

In support of this he contended,

1. That as Mr. Gordon had died on the 24th of August, and the bill had been drawn, per procuration of him, on the 11th of November, there was no existing mandate in favour of the defender, and therefore he had no legitimate authority to draw the bill.

2. That as he had been previously aware that there had been reports of the death of Mr. Gordon, it was incumbent on him, before drawing the bill, to have made the pursuer aware of that fact; and at all events he was not in bona fide to act upon his factory, to the effect of drawing such a bill, so long as such a rumour remained uncontradicted; and,

3. That from the nature of the letters which he wrote individually at the time when the bill was drawn, he came under an obligation to provide for it, and thereby to relieve the pursuer.

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* See ante, Vol. II. No. 330.

On the other hand, it was contended in defence,

1. That as no authentic information had been communicated to the defender of the death of Mr. Gordon at the time when the bill was drawn, his factory remained in full force until that event was made known to him.

2. That an action of reduction of a document in the hands of the pursuer himself was not competent; and,

3. That as the defender never had any communication with the pursuer, except in the character of factor for Mr. Gordon, and as the bill had been drawn in behalf of, and the proceeds applied to the use of that gentleman, no personal liability could attach to him.

The Lord Ordinary assoilzied the defender; and the Court, after hearing the counsel for the pursuer, and declining to hear the defender's counsel, adhered.

The LORD ORDINARY observed in a note:—

The form of reduction adopted here does not seem accurately calculated for the grounds of the action. The bill sought to be reduced is not in the defender's hands, but in the pursuer's; nor does he found any action upon it against the pursuer; and if it be null, this defence ought to have been pleaded in the action where the pursuer was found liable to pay the amount to the holder of it. Moreover, after the reason of reduction founded on the clause of style, the two next may afford grounds for relief, but not for reduction of the bill, which is the only writ called for. The fourth reason is the only proper ground of reduction that the bill is null, as having been drawn subsequent to the death of the mandant. But as this event was not known at the time in this country, the defender's having continued to act on his factory was legal, and therefore the bill cannot be set aside on that ground.

If it be competent under this summons to consider whether the pursuer has any claim of relief against the defender, it appears to the Lord Ordinary to be quite clear that the defender neither meant to undertake any personal responsibility, nor did the pursuer understand that he did. The pursuer was the chief partner in the house of Campbells, Fraser, and Company, who were the consignees of the late Mr. Gordon of Draikies for his West India estates. The defender, as factor on the estate of Draikies, was authorized by the pursuer to draw upon his house on behalf of Mr. Gordon. He accordingly asked leave (28th October 1809) to draw for £500; and if this was permitted, he begged the pursuer to write Mr. Gordon, 'that he may have the earliest knowledge of this addition to his 'engagements with you, and provide accordingly.' The pursuer, on 4th November 1809, says,—'Your draft on Campbells, Fraser, 'and Company, will meet honour to the extent you mention; and

'should remittances not be received, and that they require it, you 'can reimburse them in some shape until the crop comes round.' The defender accordingly draws the bill under reduction for £500, 'per procuration of Robert Gordon;' and besides notifying officially to the house, he notifies also privately to the pursuer, and adds,— 'By the time it falls due, I trust you will be in possession of pro- 'duce to meet it, or that it can be otherwise provided for, should 'you find it necessary.' Before the bill was presented for acceptance, the accounts of the death of Mr. Gordon reached this country, when the embarrassment of his affairs became known; and Campbells, Fraser, and Company refused to accept the bill, being then, as they state, in advance about £5000 for Mr. Gordon. The Court, at the instance of the holder of the bill, found them liable in terms of the permission to draw in the letter of 4th November 1809, and the pursuer has been compelled to pay.

Now it appears that in the whole transaction the defender was acting, and was known to be acting as the factor of Mr. Gordon, and for his behoof. The reimbursement was to come from the crop in the West Indies, all of which was consigned to Campbells and Company; and the utmost that the defender was asked to do was, if remittances did not arrive, and if Gordon's agents required it, he, as Gordon's factor, should reimburse them till the crop came round,— that is, provide some temporary accommodation, by discount or otherwise, if they really required it, till the crop arrived, from which both parties contemplated that it was ultimately to be paid. In the correspondence subsequently, any thing like a personal responsibility by the defender is not pleaded. They refused, however, to accept or to take charge of this bill; they never, therefore, did or could call upon the defender to provide for it till the crop came round. Further, it would appear that they actually received the crop as consignees; for it is admitted by them that their debt, stated to have amounted to £5000, has been paid off; and if, by paying this bill at the time, they had put themselves into a condition to claim reimbursement for it, they would probably have been successful to this further extent also. But when they did not do so, it appears to the Lord Ordinary that they cannot claim relief from the defender personally.

Pursuer's Authorities.—3. Ersk. 3. 41; Ayton, March 2. 1679, as reversed in H. of L. (14573.)

Defender's Authorities.—3. Ersk. 3. 41; Bell, 395, and authorities there.

C. M'Dowall, W. S.—T. Mackenzie, W. S.—Agents.

R. GORDON and Others, Suspenders.—*More.*
J. ROMANES, Charger.—*Marshall.*

No. 59.

Process—Stat. 6. Geo. IV. c. 120.—Circumstances under which a party who had lodged an irregular condescendence, was found not liable in expenses.

Dec. 7. 1826.

1st DIVISION.
Lord Meadowbank.
H.

IN a suspension which was brought under the old forms of process, the Lord Ordinary, after a great deal of litigation, appointed a revised condescendence to be lodged in terms of the statute 6th Geo. IV. c. 120. A condescendence was accordingly given in, which having been objected to as not in terms of the statute, the Lord Ordinary, 'in respect the suspenders have 'failed to give in a revised condescendence in terms of the late 'Judicature Act and relative act of sederunt, the paper, No. 83 'of process, termed a revised condescendence, being altogether 'irregular, and no fulfilment of the order, and it being admitted 'by the counsel who signed the same, that it was not prepared 'by him, and that it was so signed by mistake, ordains the same 'to be withdrawn, and appoints the suspenders to give in a new 'revised condescendence, framed strictly in terms of the statute 'and relative act of sederunt, by the first box-day, and the char-'ger to revise his answers by the second box-day, both in the en-'suing vacation; and finds the charger entitled to the whole 'previous expenses of this process.' The suspenders then reclaimed, when their counsel explained at the bar, that the parties having been on terms of compromise, the agent in the cause had brought him the revised condescendence about half an hour before the period for lodging it expired, requesting him to sign it, merely to prevent the interlocutor from becoming final, and that he had done so on condition, that if the compromise was not carried into effect, it should be withdrawn, and a correct one lodged; and that all the suspenders complained of, was the award of expenses which had been pronounced ex proprio motu of the Lord Ordinary. The charger having stated that he did not insist for expenses, the Court recalled the interlocutor to that extent, and remitted to the Lord Ordinary to proceed accordingly.

W. WALLACE, W. S.—TOD and ROMANES, W. S.—Agents.

No. 60.

ANNE M'INDOE and Others, Pursuers.—*Greenshields.*
G. LYON and Others, Defenders.—*Jeffrey—Fullerton.*

Title to Pursue—Deathbed—Process.—A party, by deed of settlement, left heritable property to his widow, failing whom, to substitutes. The widow, after having been infeft, executed a conveyance mortis causâ to the exclusion of these substitutes, who brought a reduction of her settlement ex capite lecti, describing themselves as heirs of provision to the original granter, but narrating his deed of settlement, whereby their true characters as heirs of provision to the widow appeared.—Held,—1.—That so libelling themselves, the summons was inept to support a conclusion of reduction ex capite lecti;—2.—That a supplementary summons was incompetent;—and,—3.—That the objection was one which could not be waived by the parties having gone to issue without stating it; but right to bring a new action in the proper character reserved.

Dec. 7. 1826.
2D DIVISION.
Lord Pitmilly.
M'K.

THE late Robert Hunter, by his deed of settlement, conveyed all his heritable estate to his wife Anne Cumming, 'in case she 'shall survive me, and to her disponees whomsoever;' and failing her surviving, or disponing the subjects in the event of her survivance, one portion was destined to Mary Murray in liferent, and her children in fee; and the remainder to the pursuer Anne M'Indoe in liferent, and to her children in fee; these parties being likewise mutually substitutes to each other in their respective shares. Anne Cumming survived her husband, and was infeft in the subjects in question; and, shortly before her death, she executed a trust-disposition of the property in favour of Lyon and others.

Of this trust-deed a reduction on the head of deathbed was brought in 1813 by Anne M'Indoe and her children, (Mary Murray and her children having failed,) libelling themselves as 'heirs apparent of 'the deceased Robert Hunter.' Their title, as thus set forth, having been objected to, they were allowed to put in an amendment of the summons, in which they designed themselves 'as heirs 'apparent of provision of Robert Hunter, conform to the deed 'of settlement executed by the said Robert Hunter of date the '28th of September 1811, whereby he gave, granted, alienated, 'and disponed, with and under the burdens and declarations 'therein mentioned, to and in favour of Anne Cumming, his wife, 'in case she should survive him, and to her disponees whomso-'ever, and failing the said Anne Cumming by decease before 'him, or failing her disponing or conveying the subjects thereby 'disponed, in case she did survive him, to the said Mary Murray, 'to the extent therein mentioned, in liferent, for her liferent use 'only, and to her lawful children,' &c.; 'and to the pursuer, the 'said Anne M'Indoe, to the extent therein mentioned, in liferent, 'for her liferent use only, and to the lawful issue procreated or

'to be procreated of the said pursuers, equally among them, and 'to the survivors and survivor of them, and to the lawful issue '(equally among such issue) of the deceasers or deceaser of them, 'in fee.'

Great avizandum was made, without any further objections to the title; and after a proof had been taken, and considerable procedure had thereon, the Lord Ordinary sustained the reasons of reduction, and reduced in terms of the libel.

On the case having been brought before the Court by petition, doubts were started by the Bench as to the pursuers' title; and minutes were ordered on the question, 'whether the pursuers pos-'sess the proper character of heirs entitled to pursue reduction 'on the head of deathbed.' By the defenders it was contended, That the pursuers possessed no title to pursue this reduction, and that at all events the title set forth in their amended summons, as heirs of provision to Robert Hunter, gave them no right to pursue a reduction ex capite lecti of a deed not executed by him, but by Anne Cumming. On the other hand, the pursuers contended, That by engrossing in their summons the deed which formed their title, and which set forth their true character as heirs of provision to Anne Cumming, they had truly libelled a sufficient title to insist in this action, although, by an error, their designation in the summons was not strictly correct; but they rested their case chiefly on the ground, that the defenders having gone to issue on the merits, they could not now object to the title; and they craved at least to have a supplementary summons newly raised conjoined with the present process, to the effect of validating the prior proceedings.

The Court recalled the Lord Ordinary's interlocutor, and found 'that the libel, both as originally laid, and as subsequently 'amended, being at the instance of the respondents as apparent 'heirs, or apparent heirs of provision to Robert Hunter, is an in-'competent proceeding for challenging, on the head of deathbed, 'a deed executed by Anne Cumming;' and they therefore dismissed the action, but found no expenses due,—'reserving to the 'respondents to proceed in any other competent action, and to 'the petitioners their defences, as accords,'—and also reserving to the pursuers their claim to found in such action on the proof taken in this process, and to the defenders their objections.

LORD GLENLEE.—The ordinary case where an objection to title may be barred by acquiescence, is when the objection is, that the title libelled is not in the pursuer; and if such an objection is not pleaded in proper time, the party cannot resort to it afterwards. But here

the libel does not set forth a sufficient title to support the conclusions. It does not bear that the pursuers are heirs alioqui successuri of Mrs. Cumming; and no consent of parties could warrant the Court to give judgment on such a libel. This is similar to a case reported by Kilkerran of a process of division of a commonty, where, after a proof had been led, the whole proceedings were set aside, in consequence of its appearing that in the summons the pursuer was set forth as having only a servitude. The libel being inept, no consent can make it competent; and we cannot allow a new summons as supplementary to one totally inept.

LORDS JUSTICE-CLERK and PITMILLY concurred.

LORD ALLOWAY.—I concurred in the interlocutor at the former advising, but I have now come to a different conclusion. It requires no title to be made up to pursue a reduction on the head of deathbed; an interest is all that is necessary; and accordingly creditors of an apparent heir have been allowed to pursue such an action. In this case the pursuers have a clear interest, as heirs alioqui successuri to Mrs. Cumming; and though the designation may be, strictly speaking, erroneous, the terms of the deed by Hunter completely prevent any mistake, and set forth a sufficient interest to support the action.

E. LOCKHART, W. S.—CARNEGY and SHEPHERD, W. S.—Agents.

No. 61. GOVERNORS of HERIOT'S HOSPITAL, and the MAGISTRATES of EDINBURGH, Advocators.—*Sol.-Gen. Hope—L'Amy—More.* DICKSONS, Brothers, Respondents.—*D. of F. Moncreiff—Alison.*

Reparation—Common Sewers.—The proprietors of feuing ground, who had originally formed a common sewer for the use of the houses to be built on the ground feued out by them, having allowed a greater quantity of sewage water to be conveyed into the sewer than it could adequately carry off, held liable in reparation of damages thereby occasioned.

Dec. 7. 1826.

2D DIVISION. Lord Mackenzie. M'K.

THE barony of Broughton, and other lands in the neighbourhood, originally belonged to Heriot's Hospital, by the Governors of which several parcels (now entirely covered with houses) were feued out about a century ago for agricultural purposes. Some of these remained in the hands of private individuals, by whom they were feued out for building, and now form Broughton place, Forth street, Hart street, &c.; while other parts were acquired by the City of Edinburgh, and particularly the ground on which York place, greater part of Albany street, and Broughton street, now stand. In 1797, the Magistrates of Edinburgh entered into an arrangement with Heriot's Hospital for building York place, the feus in which were made to hold directly of the Hospital, and were feued out with reference to a plan signed by

the Lord Provost on the part of the City, and by the Governors of the Hospital. According to this plan, there was a covered main drain for carrying off the sewage water, which proceeded down Broughton road, (the ground on one side of which still remains the property of the Hospital,) and emptied itself into an open ditch in ground belonging to the Hospital, and at present held in lease by the respondents. This main drain, it appeared, had been built by the Hospital; but the individual feuars were bound to make their communication drains at their own expense. Some time afterwards the Magistrates feued out Albany street, and the feuars were allowed to take their sewers into the Broughton road main drain,—the Magistrates, however, paying one-half of the expense of the communication sewers. In this street also there were two houses holding directly of the Hospital, the sewers of which in like manner communicated with this main drain, into which also it appears the drains from other adjoining streets on the property of private individuals holding under the Hospital were conveyed. In consequence of these increased communications, the main drain (which was originally sufficient for York place) became incapable of properly carrying off the additional quantity of sewage; and accordingly, on occasion of a heavy rain, the lower end of the drain burst, and the water continued for some years to run on the surface of Broughton road till it entered a garden, the property of the Hospital, and let by them to Dicksons, respondents, by a grating from the surface, instead of being discharged from the mouth of the covered drain into an open ditch in the garden, as was the case before the drain burst. On the 4th of June 1822, a remarkably heavy fall of rain caused such a flood in the drain, that it could not all pass through the opening above mentioned, and it accordingly flooded the garden, and occasioned considerable damage by the destruction, &c. of plants. Thereupon Dicksons raised an action before the Sheriff of Edinburgh against Heriot's Hospital and the Magistrates of Edinburgh, concluding for damages occasioned by their neglect in not having either enlarged the main drain, or prevented the additional sewage being emptied into it. The Sheriff remitted to a gardener to estimate the damage, and to Mr. Stevenson, an engineer, to report on the state of the drain. The damage was estimated at about £24, and Mr. Stevenson reported that the cause of it was the ruinous state of the lower end of the drain, which again had been occasioned by its being allowed to become the channel of a greater quantity of sewage than its size was fitted for. The Sheriff then decerned against the Hospital and the Magistrates for payment of the reported damage, reserving to them their relief

against the individual proprietors, the drains from whose grounds had been conveyed into the Broughton road drain, and against the feuars on these grounds; and in advocations at the instance of the Hospital and the Magistrates, the Lord Ordinary and the Court remitted simpliciter, with expenses.

The LORD ORDINARY observed in a note:—'It appears to the Lord 'Ordinary that the Hospital and the Town, having feued their pro- 'perty upon plans connected with this drain, were bound to the 'neighbouring proprietors, to one another, and to the public, on ac- 'count of the road, to keep the drain, or see it kept, in proper con- 'dition; and that the respondents, having obtained a lease, had right 'to the benefit of this obligation both against their own landlords, 'the Governors of the Hospital, who must be held to have under- 'taken to fulfil this duty in favour of their own lands so let, and 'against the Town, which was bound to all parties acquiring real 'right in that land. It appears, then, that the respondents, having 'suffered damage from neglect to perform this obligation, must have 'right of reparation against both the advocators.'

The COURT concurred with the Lord Ordinary, and were agreed that although no responsibility lay on the Magistrates or the Hospital qua superiors merely, yet the drain having been built by the Hospital, and the Magistrates having acted along with them as proprietors of it, and both having feued their lands with reference to it, and taken benefit by it, they were still bound to improve it and enlarge it, before allowing communications, so as to adapt it to the additional sewage brought into it by these communications; and that they were not relieved from their responsibility by any stipulations with their feuars as to making their own drains, whatever relief they might have from parties who had opened sewers into the drain without permission.

MACRITCHIES, BAYLEY, and HENDERSON, W. S.—J. CAMPBELL Jun. W. S.—Agents.

No. 62.

J. WATT, Suspender.—*Baird.*
W. ANDERSON and SON, Chargers.—*Neaves.*

Dec. 7. 1826.
2D DIVISION.
Bill-Chamber.
Lord Medwyn.
F.

Previous Expenses.—A bill of suspension having been presented by Watt of a judgment of the Magistrates of Dundee pronounced against him in default of his leading a proof, notwithstanding various prorogations and opportunities allowed him for that purpose, the Lord Ordinary, in remitting to the Magistrates to repone him, made it a condition that he should pay the previous expenses. The Court adhered.

J. BURNESS,—RITCHIE and MILLER,—Agents.

J. PEDIE, W. S.—*Brownlee.*
Mrs. MATHESON.—*A. Wood.* } Claimants in Multiplepoinding. No. 63.

Process—6. *Geo. IV. c.* 120.—Held that a party is not bound to revise his condescendence of a claim in a multiplepoinding, unless he shall deem that necessary, but that he ought to make appearance to state this at the enrolment for closing the record; and that, if he fail to do so, he is liable in expenses before he can be reponed against an interlocutor dismissing his claim, on the ground that it had not been revised.

Dec. 7. 1826.
2D DIVISION.
Ld. Cringletie.
F.

CONDESCENDENCES of claims in a multiplepoinding having been given in by Pedie, Mrs. Matheson, and other claimants, an order was pronounced for revising the claims. Pedie did not think it necessary to revise his; and not having appeared to state this at an enrolment by Mrs. Matheson for the purpose of closing the record, the Lord Ordinary, on Mrs. Matheson's motion, (of which, however, no notice had been given, the notice being merely to close the record,) dismissed Mr. Pedie's claim, 'in 'respect he has not revised his condescendence and claim in 'terms of last interlocutor, and does not now appear to support 'the same.' Pedie gave in a reclaiming note to be reponed; and contended, that as the motion had been made by Mrs. Matheson without previous notice, she ought to be subjected in the expense of this application thereby rendered necessary. But the Court, while they reponed Pedie against this interlocutor, remitted to the Lord Ordinary to award against him such expenses as his Lordship should see reasonable.

The Court, while they held that it was not obligatory on Pedie to revise his condescendence of claim, unless he saw cause, were of opinion that he ought to have appeared at the enrolment for closing the record, to state that he was satisfied with the paper as originally lodged.

J. PEDIE, W. S. Agent.

No. 64. J. SMITH and Others, Pursuers.—*Sol.-Gen. Hope—Murray.*
BANK OF SCOTLAND, Defenders.—*Jeffrey—Walker.*

Proof—Hearsay—Witness.—Held,—1.—That a witness is admissible to prove a statement by the defenders' agent now dead to the husband of the witness, also now dead, and by him to the witness;—and,—2.—That her deposition having been taken and sealed up, it is incompetent, before determining as to her admissibility, to allow her deposition to be opened, in order to ascertain whether the agent's statement was an admission on the part of the defenders, or merely a narrative of what he had heard them say.

Dec. 7. 1826.
2D DIVISION.
Lord Mackenzie.
F.

SMITH and others were pursuers of a reduction of a bond of caution granted by them to the Bank of Scotland for Paterson, bank agent at Thurso, on the ground, inter alia, that the Bank, knowing Paterson to be in bad circumstances, had concealed this from the cautioners at the time of obtaining their subscriptions to the bond; and in support of this it was averred, among other allegations, that the late Mr. Fergusson, writer to the signet, the law-agent of the Bank, when in the north, shortly after Paterson's failure, had admitted to the late Lord Caithness that the Directors of the Bank were as much surprised at the subscriptions having been obtained, as they would be, if Paris should move to Edinburgh. A proof of the several allegations on the part of the pursuers having been allowed, they called Lady Caithness as a witness to establish that averment. Her Ladyship, on being examined in initialibus, deponed, that shortly after Mr. Paterson's failure, Mr. Fergusson was at Berogill Castle, 'and that a conversation took place between the late Earl, the deponent's husband, and Mr. Fergusson, in the dining-room of the castle. 'Interrogated whether she was present when the said conversation took place? depones that she cannot say whether she was 'present; but, if she was not, she must have been informed of it 'from her late husband.' An objection having been taken to the competency of her being examined as to the nature of the conversation, the commissioner took the deposition, sealed it up, and reported the objection.

For the defenders it was pleaded, That as the witness could not state that she was present at the conversation, it must be assumed that she was absent; that her testimony, therefore, was incompetent as hearsay at third hand, she being asked to depone as to what she had heard her husband say as to what Fergusson had told him regarding a statement made to Fergusson by the Directors or a Director of the Bank; and they proposed to open the deposi-

tion, to show that this really was the nature of the evidence given by Lady Caithness.

On the other hand, it was pleaded for the pursuers, That it was not, in point of fact, clear that Lady Caithness had not been present at the conversation; but supposing that she had not, that it was the rule of law that the best evidence which could be had was to be received; and as both Lord Caithness and Fergusson were dead, Lady Caithness' testimony was the best evidence now to be had; but, besides, that her evidence was in truth only hearsay at first hand, as the fact to be proved was the admission to Lord Caithness, (which had been allowed to be proved as a relevant circumstance of evidence,) and which she had received directly from his Lordship; and with regard to the proposal to open the deposition, it was objected as utterly incompetent before the admissibility of the witness was decided, she being to be considered as if in the witness-box before giving her testimony. The Lord Ordinary repelled the objection, and ordained the seals to be opened; and the Court adhered, reserving all objections to the effect of the deposition.

LORD JUSTICE-CLERK.—We cannot certainly allow the deposition to be opened, in order to determine the admissibility of the witness; but if the statement alleged to have been made by the bank agent in his official capacity is a relevant circumstance of evidence, we cannot reject this witness. As to the abstract question, whether hearsay at second hand is to be rejected, I am not prepared to decide it; but I can conceive a case in the Criminal Court where it would be absolutely necessary to receive such evidence, as a murdered man having stated who was the murderer to a party since dead. On the face of the examination in initialibus, however, I am not satisfied that the witness was not present at the conversation. A great deal more should have been asked at her, and I cannot take it for granted that she was absent; but even if she was, considering the nature of the averments which have been allowed to go to proof, I cannot alter the interlocutor of the Lord Ordinary.

LORD GLENLEE.—We can know nothing as to whether the evidence is good or bad, till we see it.

LORD PITMILLY.—In the Jury Court we would look at the deposition before deciding whether it was to go to a Jury; but in this Court, from the functions of the Judge and the Jury being combined, we cannot follow a similar course. The question here is, whether the deposition is to be opened; and I concur in the Lord Ordinary's interlocutor so far, but would reserve the admissibility as well as the effect of the evidence. The Bank presents a case which would render the evidence inadmissible. The pursuers, on the other hand, state a case which would entitle it to be received. The Bank says that Fergusson

was reporting to Lord Caithness what was stated by the Directors to him, which would be hearsay of hearsay on the part of Lady Caithness; while the pursuers say that Fergusson was making an admission on the part of the Bank, in which case it would not have been hearsay on the part of Lord Caithness, and consequently is only the common case of hearsay on the part of her Ladyship. It is difficult, therefore, to judge till we know more about it. The Lord Ordinary is right in allowing the seals to be opened; but I cannot concur in repelling the objection, which would preclude the future consideration of inadmissibility. I would therefore recall that part of the interlocutor, and allow the seals to be opened up before answer; and I think that greater pains should be taken to inquire further from Lady Caithness as to whether she was actually present or not.

Lord Alloway.—I doubt whether we can concur in the suggestion of allowing the deposition to be opened, to determine whether the witness be admissible or not. We must suppose her at the bar, and in that case we could not first examine her, and then determine her admissibility. I entertain no doubt, however, that hearsay evidence is admissible, even at second hand, when the parties are dead. I can see no principle on which to reject it. But whether the evidence here is hearsay at first or at second hand, depends on what Fergusson did; for if, as law-agent of the Bank, he made the admission averred, then that is a matter of fact, as to which Lady Caithness' testimony is hearsay only in the first degree; and taking it even as the Bank states it, I cannot refuse to admit her.

Lord Glenlee.—There is really not much difference between Lord Pitmilly and us. The admissibility of the witness and of the evidence are two separate questions, and I understand the latter to be reserved.

Thomson and Ferguson, W. S.—H. Davidson, W. S.—Agents.

No. 65.

W. Glennie, Pursuer.
M'Phail, Defender.—*J. W. Dickson.*

Dec. 8. 1826.
1st Division. Lord Eldin. D.

The Lord Ordinary, after advising a proof, having pronounced judgment against the defender, and found him liable in expenses, the Court adhered. *

T. Ferguson, W. S.—D. Clyne,—Agents.

* The Court have on several occasions complained that proofs have not been lettered on the margin, and have announced that they will fine the agent failing to do so in future.

R STEIN and Others, Pursuers.—*H. Bruce.*
Misses STEIN, Defenders.—*Jeffrey—A. Wood.*

No. 66.

Faculty—Power of Division.—Circumstances under which it was held that a power of dividing a sum bequeathed by a deed of settlement had not been validly executed, and that in terms thereof it belonged to the legatees equally.

Dec. 8. 1826.
1ST DIVISION.
Lord Eldin.
D.

BY a deed of settlement of the late Robert Stein of Blackhall in favour of his daughters, the defenders, he bequeathed to the pursuers, 'Robert, Prudence, and Euphemia Stein, the three 'children of my said son David, now deceased, and the survivors 'or survivor of them, at the term of payment after mentioned, 'the sum of £500 sterling, the said sum to be payable upon the 'youngest of them surviving attaining majority, with interest 'from the term of Whitsunday or Martinmas preceding my 'death; to be paid the said interest half yearly to my said 'grandchildren, till the said principal sum shall fall due; and 'which sum of £500 provided to my said grandchildren, and in-'terest to fall due thereon, shall be paid and be divided amongst them, and the survivors of them, at the terms of payment afore-'said respectively, in such proportions as a majority of my said 'daughters surviving at the said term of payment, or my last 'surviving daughter in the event of one of them only surviving 'at said term of payment, shall direct by a writing under their 'or her hand; and failing such division of the said principal sum 'or interest by my said daughters, or a majority of them, sur-'viving as aforesaid, or last survivor of them as aforesaid, then 'the same shall fall and belong and be paid to my grandchildren, 'and the survivors of them, equally, share and share alike; and 'in the event of one only of my said grandchildren surviving the 'said terms of payment, the said sum of £500, and interest 'thereon, shall belong and be payable to him or her wholly.' He died early in 1817, and the youngest of these children arrived at majority in October 1824, at which period no division was made in terms of the deed of settlement.

During the greater period of their minority, the pursuers resided with the defenders; and it was alleged by the latter that no remuneration had been paid to them on that account, and that they had advanced several sums of money for clothing and educating them.

On the other hand it was stated, that the defenders had availed themselves of the pursuers' services in a menial capacity; and it was denied that any expense, as alleged, had been incurred.

On the 6th of May 1825, and after the present action had been

threatened, the defenders executed a deed of division, whereby they declared 'that the said Robert Stein's share or proportion 'thereof shall be £400 of principal, with interest corresponding 'thereto; that the said Prudence Stein's share or proportion 'thereof shall be £50 of principal, with interest corresponding 'thereto; and that the said Euphemia Stein's share or proportion thereof shall be £50 of principal, with interest corresponding thereto.' The execution of this deed was not intimated till after this action had been raised, and in the mean while the defenders had advanced a considerable sum of money to Robert, with a view to establish him in business. In this action the pursuers concluded that the defenders should be ordained to make payment to them of the £500 in equal shares, with interest from Martinmas 1816; but, before any procedure took place, Robert and Prudence withdrew, and the action was insisted in by Euphemia Stein and her husband John Maughan.

In defence it was pleaded,

1. That as the defenders had been empowered by the deed of settlement to make a division of the fund, and as they had done so, it must receive effect; and,

2. That they were entitled to retention of the sum in their hands, in order to compensate the claims which they had for board and pecuniary advances.

To this it was answered,

1. That as the deed of settlement declared that the power of division was to be exercised on the youngest of the pursuers attaining majority, failing which, it was to be equally divided among them; and as the youngest had attained majority in October 1824, and no division had been made till May 1825, the fund must belong to the pursuers in equal shares.

2. That as the division had been made with a view to defeat this action, and not in the fair exercise of the power, and was palpably unjust, it was totally unavailing; and,

3. That as the defenders had enjoyed the benefit of the pursuers' services during their minorities, they had no claim for board; and the advances were denied.

The Lord Ordinary found, 'that by the disposition and deed 'of settlement of the deceased Robert Stein, father of the de-'fenders, dated 15th August 1816, he bequeathed a sum of '£500 sterling to Robert, Prudence, and the pursuer Euphemia 'Stein, the three children of his son David deceased, payable 'upon the youngest of them attaining majority, in such propor-'tions as a majority of his daughters, surviving at the term of 'payment, should direct by a writing under their hand; and

'failing such division, then the same should fall and belong and 'be paid to his grandchildren equally:—that the defenders, to-'gether with a sister now deceased, accepted of the said disposi-'tion and settlement, and intromitted with the estate and effects, 'and the defenders have rendered themselves liable for the said 'provision of £500 bequeathed as aforesaid:—that Robert Stein, 'the youngest of David Stein's children, arrived at the age of ma-'jority on the day of October 1824, but no division of the 'said sum of £500 was then made by the defenders:—that re-'peated applications having been made to them for payment of 'the said sum, no notice was taken thereof, and the said Robert, 'Prudence, and Euphemia Stein, and John Maughan, husband 'of Euphemia Stein, upon the 15th day of June 1825, entered 'into an agreement to divide the said provision equally among 'them:—that the defenders, upon the 6th day of May 1825, 'executed a paper, called a deed of division, making a distribu-'tion of the said sum of £500, in which they bestow no less than '£400 upon Robert Stein, and no more than £50 each upon 'Prudence and the pursuer Euphemia Stein, the terms of which 'deed were not intimated to the pursuers till some months after 'the present action was raised: Finds that, in these circumstances, 'the said division is utterly incompetent, and therefore finds the 'defenders liable to the pursuers, Euphemia Stein, and John 'Maughan her husband, in one third part of the said sum of '£500, with the legal interest thereof from Martinmas 1816, being 'the term of payment; and with regard to the defenders' claims 'of compensation, repels their claim for the pursuers' board, but 'finds them entitled to credit for such sums of money or articles 'as they can legally instruct to have been furnished to or on ac-'count of the pursuers;' and remitted to an accountant to report as to these claims.

The defenders having reclaimed, the Court, without hearing the counsel for the pursuers as to the division, adhered; but remitted to the Lord Ordinary to hear parties further as to the claim for board.

LORD PRESIDENT.—The division which has been made is quite incompetent, and indeed it seems to have been made with a view to enable the defenders to compensate the claim which they allege they have against Robert for their advances in putting him into business.

LORD BALGRAY.—The interlocutor appears to me to be quite right as to the power of division. The defenders should have known when the pursuers attained majority, and then have made the division in terms of the deed of settlement. But they did not do so,

and therefore there was immediately vested in the pursuers an interest in the fund to the extent of one third each. Besides, it appears to me that this division has not been made in a pure and proper manner. On this part of the case I have no difficulty; but I rather think that some allowance should be made for board.

Lord Craigie.—I am not sure that I can go so far as Lord Balgray, as to hold that the power required to be exercised on the very day when the youngest child attained majority. I am clear, however, that we cannot sustain the division which has been made. If the defenders have any just claims against the pursuers, they must of course be entitled to deduction; but that matter remains for investigation.

Lord Gillies.—I concur entirely in the opinion of Lord Balgray as to the power of division. We cannot, however, repel the claim of board, as has been done by the Lord Ordinary. In the circumstances, I think that it should be limited to the interest of the principal sum.

Horne and Rose, W. S.—Inglis and Weir, W. S.—Agents.

No. 67.

A. Gall, Pursuer.—*Sol.-Gen. Hope—Dickson.*
Mrs. Adie and Others, Defenders.—*Cockburn—Marshall.*

Dec. 8. 1826.
1st Division.
Lord Medwyn.

This was a special case, in which the pursuer endeavoured to obviate an objection to his title by reference to a series of interlocutors which he alleged had the effect to sustain it. The Lord Ordinary having appointed parties to debate thereon, and thereafter appointed the pursuer to lodge a condescendence, he reclaimed; but the Court adhered.

D. Clyne, Agent.

No. 68.

T. A. Fraser, Pursuer.—*Gordon.*
A. T. F. Fraser, Defender.—*Cockburn—Rutherfurd.*

Trust—Entail.—Certain persons holding an entailed estate in trust, under condition that they should only denude in favour of the heir when the whole debts affecting the estate were extinguished, and having denuded while certain debts remained unpaid, to answer which, however, they stated that they had retained funds—Held, on these debts being demanded from a succeeding heir, that he was entitled to decree in an action of relief, not only against the trustees, but also against the representative of the heir in whose favour they had denuded, and who had granted them a discharge.

Dec. 8. 1826.
2d Division.
Lord Cringletie.

The Lovat estate, which had been forfeited in 1745, was restored in 1774 to General Simon Fraser, eldest son of Simon Lord Lovat, subject to a considerable debt then due to the Crown.

B.

Immediately thereafter General Fraser executed a deed of entail of the estate, accompanied by a trust-deed, whereby certain persons were put in possession of the estate, as trustees, for the purpose of applying the rents to the liquidation of the debt, allowing only £500 a year to the heir of entail. General Fraser died in 1782, and was succeeded by his brother, whose son Archibald obtained an act of Parliament for altering the nature of the trust, and selling such parts of the estate as might be necessary to pay the debts due by the entailer, and thereafter establishing a sinking fund of £400 per annum, to be ultimately employed in the purchase of lands to be entailed in place of those sold under authority of the statute. This act accordingly empowered the persons who were trustees under the original deed of trust to take steps for carrying it into effect, and directed that when the purposes of the act should have been so carried into effect by extinction of the debts, they should denude themselves of the estate to the heir of entail for the time entitled to possession. Certain lands were accordingly sold; and in 1801 the trustees having, as they alleged, paid off all the debts, or provided funds for their extinction, executed a procuratory of resignation in favour of the late Lovat, proceeding on the narrative of all the debts being paid, and they received from him a deed of ratification and discharge, in which, after narrating the whole proceedings under the trust, and that all the debts were paid, excepting four specially mentioned, as to which certain disputes were depending, he discharged the trustees, and bound and obliged himself, his heirs of entail, and successors whomsoever, 'to free and relieve the said 'trustees, and their heirs and successors, of all engagements 'which they may have come under relative to the said entailed 'estate.'

On the death of the late Lovat, the present pursuer succeeded to the estate of Lovat as heir of entail, and payment of the debts specified in the above-mentioned discharge, and which had not been paid, having been demanded from him, he raised an action of relief against the trustees, and also against the present defender, who was the representative of the late Lovat. Various defences were pleaded, and a long litigation ensued; but the Lord Ordinary ultimately decerned against all the defenders, jointly and severally, in relief, (except in regard to one of the debts which was proved to have been paid,) and found them liable in expenses. In this interlocutor the trustees acquiesced; but Lovat's representative reclaimed, and contended, inter alia, that if sufficient land to pay the whole debts had actually been sold by the trustees, and if the amount thus provided for the extinction of the debts here

in question had been retained by them, and was still in their hands, there was no ground for this action as against Lovat's representatives, however justly it had been raised against the trustees; and, on the other hand, that if land had not been sold to pay these debts, then the pursuer, as heir of entail, was lucratus thereby, and was not entitled to demand relief against the claim for the debts, and also to retain the additional land so possessed by him, which ought to have been sold to pay them.

The Court, however, unanimously adhered.

LORD JUSTICE-CLERK.—It was perfectly right in the trustees to denude of the estate, after having paid all the debts, or provided funds for their extinction. But this is an action of relief, calling on them to do their duty in applying these funds to these debts. The late Lovat's representative is also properly called, because, if funds had not been retained, he would have been liable as representing the heir benefited by the immediate renunciation of the estate on the part of the trustees. Both parties, however, have kept up a long and useless litigation, and they must, conjunctly and severally, bear the consequences in the expenses awarded against them.

LORD ALLOWAY.—I entirely agree with what has been stated from the Chair. The late Lovat bound himself and his heirs to relieve the trustees from all obligation arising from their ceding the estate to him; and I therefore cannot distinguish between his representative and the trustees.

LORDS GLENLEE and PITMILLY concurred.

J. MORISON, W. S.—Æ. MACBEAN, W. S.—Agents.

No. 69.

J. COCKBURN and Others, Pursuers.—*Clerk Maxwell.*
W. WALLACE and Others, Defenders.—*Sol.-Gen. Hope—Skene—Robertson.*

Dec. 9. 1826.

1ST DIVISION. Lord Meadowbank. H.

THE case noticed ante, Vol. IV. No. 109, having been appealed by the Governors of Heriot's Hospital, and the judgments, so far as they were concerned, reversed;* and the interlocutor in the question with Wallace and others having been delayed to be signed in consequence of the appeal, they now contended that the reversal necessarily implied that the judgments as to them were erroneous; but the Court, being satisfied that this was not the case, adhered to their former interlocutor.

RUSSELL and COWAN, W. S.—MACRITCHIES, BAYLEY, and HENDERSON, W. S.—J. PEDIE, W. S.—Agents.

* See Wilson and Shaw's Appeal Cases, May 23. 1826, p. 293.

W. Roy and Others, Advocators.—*Jeffrey—Clephane.*
T. Wright and Others, Respondents.—*Sol.-Gen. Hope—M'Neill.*

No. 70.

Process—Stat. 6. Geo. IV. c. 120.—Circumstances under which a record was objected to as irregular, and a remit made to the Lord Ordinary of new to prepare the cause.

Dec. 9. 1826.

1st Division.
Lord Meadowbank.
H.

In this case, which was an advocation under the old forms of process, the Lord Ordinary appointed a revised condescendence, answers, and notes of pleas, in terms of the statute, which were accordingly lodged; and the record having been closed, and counsel heard, his Lordship pronounced judgment against Roy and others. These parties having reclaimed, and the Court being of opinion that the record had not been made up in terms of the statute, remitted the case back to the Lord Ordinary to prepare the same in terms thereof.*

Lord President.—This record is worse than that of Sproat's, which I formerly objected to; and I have resolved that I will not judge in such cases. The condescendence and answers are filled with quotations of interlocutors, excerpts from a proof, and with allegations in point of law.

Lord Gillies.—It is the proper duty of the Lord Ordinary to see that the cause is properly prepared, and therefore it should be remitted back to him for that purpose.

Clephane.—This case proceeded for a considerable time under the old system, and I endeavoured, without introducing the interlocutors in the Inferior Court and the proof, to prepare the paper on behalf of my clients; but I found that I could not make the case intelligible. No objection was made either by the opposite party or the Lord Ordinary.

Lord President.—The statute must be obeyed. The proof should not be quoted, the object of a condescendence being, not to aver what is proved, but what is offered to be proved. It is no answer to say that the Lord Ordinary did not object. We must enforce the statute. Indeed the real truth is, that both the Ordinary and the counsel are to blame,—the counsel for giving in such papers, and the Lord Ordinary for receiving them. We cannot advise the case on such a record; it must therefore be prepared of new.

W. Guthrie,—D. Scales,—Agents.

* Excepting in this case and that of Sproat, ante, No. 47, no other Record was objected to, prior to the Recess, in either Division of the Court.

No. 71.

J. MENZIES, Pursuer.—*More.*
J. and J. BERRY, Defenders.—*Jameson.*

Cessio Bonorum—Expenses.—An opposing creditor in a cessio bonorum, having failed to prove allegations of fraud brought forward by him against the bankrupt, found liable in the expenses of the proof.

Dec. 9. 1826.
2D DIVISION.
B.

MENZIES, having raised an action of cessio bonorum, was opposed by John and James Berry, the trustees of a creditor deceased, on the ground of alleged fraudulent conduct on his part. The Court allowed the defenders a proof of their allegations, in which they proposed that they should be received as witnesses in regard to something which was said to have passed with the pursuer when no other person was present; but this having been refused on account of their partial counsel in the cause, and the proof having otherwise failed, the Court granted the benefit of the cessio, and found the pursuer entitled to the expenses of the proof.

A. GIFFORD,—A. GREIG, W. S.—Agents.

No. 72.

J. WHITE, Suspender.—*Menzies.*
W. M'FARLANE, Charger.—*Sandford.*

Process—6. *Geo. IV. c.* 120.—*A. S. Nov.* 12. 1825.—Held discretionary in the Judge to apply to cases previously in Court the provision in the above act of sederunt relative to delaying an award of expenses for the discussion of dilatory defences till the end of a cause.

Dec. 9. 1826.
2D DIVISION.
Admiralty.
Bill-Chamber.
F.

M'FARLANE having in 1824 raised an action in the Court of Admiralty against White and others, as owners of the steam-boat Fingal, plying in the river Clyde, for the balance of his wages as master, was met by the dilatory defence, that a certificate of registry was the only evidence of ownership, and that the Fingal had never been registered. The defences were lodged before the late Judicature Act came into operation; but it was not till after that period that a judgment was pronounced by the Judge Admiral, which repelled this defence, in respect the Fingal was only engaged in inland navigation. The Judge Admiral having, however, at the same time decerned in favour of M'Farlane for the expenses of the discussion, White presented a bill of suspension, on the ground that, by the act of sederunt 12th November 1825, it was incompetent to award expenses on repelling a dilatory defence.

To this it was answered, That, as to causes already in Court, it was in the discretion of the Judge Admiral to adopt the new form

of procedure, only if he should deem it 'consistent with justice and 'the convenience of parties.' The Court unanimously refused the bill.

LINNING and NIVEN, W. S.—J. B. WATT,—Agents.

J. CLARK, Pursuer.—*H. J. Robertson.* No. 73.
J. SCOTT, Defender.—*Robertson.*

Parole Proof explanatory of Feudal Title.—Proof allowed before answer in a question with an onerous purchaser to explain a charter, containing more than one description of the property conveyed, alleged to be contradictory.

Dec. 9. 1826.
2D DIVISION. Lord Mackenzie. F.

SMITH having purchased from Robert Inglis a feu possessed by him under the defender Scott as superior, obtained from the latter a charter, in which the feu was described as 'all and whole that 'piece of ground, with the tenement of houses built thereon, at 'Birnie, lately belonging to and possessed by Robert Inglis, church-'officer, but which he gave up to the proprietor in consideration 'of these presents being granted, measuring 85 feet in length, and '18 feet 4 inches in breadth over walls, bounded on the north by 'the yard at the back thereof, on the east by a piece of ground 'in front of Mrs. Morrice's house, on the south by the road lead-'ing from the old road to Upper Birnie, and on the west by part 'of the farm of Upper Birnie.'

On this charter Smith took sasine, which was recorded.—Shortly thereafter he sold the property to the pursuer Clark, who being refused possession of a workhouse or shop at the west end of the tenement, brought the present action to have it declared that it was included in his titles. This shop was separated from the tenement by a narrow passage, and, with the rest of the building, extended to within half a foot of the measurement specified in the charter.

In defence Scott averred that the shop in question had been built by the tenant on his farm of Birnie, and had never been possessed by Robert Inglis, or any of the pursuer's predecessors in the feu; that the measurement specified in the charter (which was inserted with a view to regulate the amount of feu-duty, being a penny per foot,) had been erroneously made in consequence of the person employed having by mistake included a barn behind, which likewise, along with the principal tenement, extended exactly to 85 feet, and that this shop was not bounded on the north by the yard, as the tenement described in the charter was stated to be; and he craved to be allowed a proof of these allegations. Clark opposed this on the ground, that being an onerous purchaser on the faith of

recorded titles, which marked out the property in question by specific measurement, it was incompetent to allow these titles to be redargued by parole proof.

To this it was answered, That where there was a single description in a charter, it could not be affected by extraneous proof; but that in the present charter, besides the measurement, the property was described by the previous possession of Inglis, and by the boundary on the north, which was contradictory of the other description; and that, in these special circumstances, it was competent to explain the description by a proof.

The Lord Ordinary found, 'that the terms of the feu-char-'ter, and of the other title-deeds founded on by the pursuer, 'taken along with the averments of the pursuer, so far as ad-'mitted by the defender, are not sufficient to render irrelevant 'the averments of the defender,' and appointed the cause to be enrolled, 'that a remit may be made to the Jury Court, or the 'cause otherwise disposed of, so as to ascertain the facts of the 'case.'

Clark reclaimed; but the Court adhered to the Lord Ordinary's interlocutor, 'so far as it finds that the averments of the 'defender may be submitted to proof before answer, and remit-'ted to his Lordship to receive a more regular condescendence 'from the defender, and thereafter to allow a proof to both parties 'of their respective averments in common form before answer; 'but, in consideration of the nature of this case, without remitting 'the same to the Jury Court.'

LORD PITMILLY.—It is right here to allow a proof before answer, and this ought to be done without going to the Jury Court, in a case where the subject in dispute is so trifling. The ascertaining how the facts stand, is in no way contrary to any rule of law. When a charter is clear and precise, it certainly cannot be controlled by parole. But that is not the nature of this charter, which contains a variety of descriptions. The pursuer rests on one of these only—that of the measurement; but the defender appeals to two other descriptions in the charter—the 'belonging to Inglis,' and being bounded by 'the yard on the north.' If there had been nothing more in the charter but the measurement, the pursuer's argument would have been invincible, however great a mistake may have been committed. But here there are other descriptions; and it is necessary to ascertain how the facts stand before answer. It will still be open, if the descriptions are found to be contradictory, to argue on the question of law which is to rule; but we cannot exclude proof to explain the description.

LORD ALLOWAY.—I entertain great doubts of the Lord Ordinary's interlocutor. The superior is the person who prepares the deed;

and he has given explicitly 85 feet over walls, to which the property, as claimed by the pursuer, extends within half a foot, with a feu-duty of a penny per foot; and how is it possible to modify the 85 feet? It is a matter of no consequence whether it was possessed by Inglis or not; we can only look at the description the superior himself gives. It is said the yard on the north does not run the whole length; but it is a common mode of expression to say that a property is bounded by a yard &c., if the greater part is so. Supposing that there really had been a mistake as to the measurement, as is averred, we could not alter it. Third parties have contracted on the faith of the description in the charter; and it is not admissible to control or limit, or even to explain by parole, a written deed on which third parties have contracted, nor possible, in this way, to correct a mistake in feudal rights.

LORD JUSTICE-CLERK concurred with Lord Pitmilly.

J. R. STODART, W. S.—J. KER and H. G. DICKSON, W. S.—Agents.

J. DUNCAN, (R. SCOUGAL and Co.'s Trustee,) *Pursuer.—Cockburn—Jameson.*
J. C. PORTERFIELD and J. BUCHANAN, Defenders.—*D. of F. Moncreiff—Shaw Stewart.*

No. 74.

Cautioner.—Held that cautioners for the trustee on a bankrupt estate were relieved by the gross negligence of the commissioners and creditors in superintending and controlling the conduct of the trustee.

Dec. 13. 1826.

1ST DIVISION. Lords Alloway and Eldin. H.

THE estates of Richard Scougal and Company, merchants in Glasgow, were sequestrated on the 7th of November 1814 in virtue of the bankrupt statute; and Boyd Dunlop having been appointed trustee, the defenders, Mr. Porterfield and Mr. Buchanan, became cautioners for him to the extent of £10,000. By the terms of their bond they 'bound and obliged themselves, jointly and severally, and their respective heirs, executors, and representatives whomsoever, that the said Boyd Dunlop, as trustee foresaid, shall faithfully manage the said sequestrated estates, and conform himself in all respects to the rules and regulations prescribed by the foresaid statute, as incumbent upon the trustees in the management thereof, and to such further rules and regulations as the Court of Session might make in virtue of the powers committed to them for carrying the said act into execution; and that the said Boyd Dunlop shall faithfully account for and pay to the creditors of the said Richard Scougal and

'Company, and the said individual partners thereof, whatever 'sum or sums the said Boyd Dunlop, as trustee foresaid, may 'recover or intromit with, of or belonging to the said sequestrated 'estates: But providing and declaring always, that this bond 'and obligation, in so far as we, the said James Corbett and 'John Buchanan, and our aforesaids, are concerned, shall extend 'only to the foresaid sum of £10,000 sterling, agreeably to the 'minutes of election before referred to, and no further.'

On the 14th of September 1815, (being ten months from the date of the first deliverance,) Dunlop made up a state of his accounts in terms of the statute, with a view of striking the first dividend, which was accordingly fixed at 8d. per pound. There having been, however, certain claims objected to, a considerable sum was left in bank to await the issue of their discussion in Court. Between the above date and the 18th of March 1816, Mr. Dunlop had uplifted £900, being part of the money so deposited, and applied it to his own purposes. On the last of these dates he exhibited his accounts to the commissioners, stating that these sums had been applied by him to the use of the estate; that £2236 remained in the hands of Sir William Forbes and Company, and £110 in the bank of Carrick, Brown, and Company. The commissioners accordingly, after examining these accounts, marked them with their initials, and two of them subscribed the following certificate:—'We, the undersigned commissioners 'upon the sequestrated estate of Richard Scougal and Com-'pany, having examined the accounts of the trustee, find the 'same accurately stated, and the sums received by him were, in 'terms of the statute, regularly deposited in the bank, and 'those drawn out were disbursed for or on account of the bank-'rupt estate.'

Again, on the 18th of September 1816, the trustee exhibited his accounts to the commissioners, from which it appeared that there were then £3361 in Sir William Forbes and Company's hands, and £255 in those of Carrick, Brown, and Company. A second dividend was struck, and £1333 were set aside to meet the disputed claims. The commissioners certified these accounts to be correct, and the creditors at the same time granted a discharge of the dividend so paid to them, in these terms:—'Considering that the said Boyd Dunlop did, in terms of the 'statute, make up and exhibit to Robert Finlay and Robert Brown 'junior, two and a quorum of the said commissioners, a state of 'his intromissions with, and disbursements made by him on ac-'count of the said estate, and that the said commissioners did,

'by a minute signed by them, and engrossed in the sederunt-'book, find the same accurately stated, and that the sums re-'ceived by him were regularly deposited by him in the bank, 'and those drawn out were disbursed for or on account of the 'bankrupt estate, &c.; therefore we have exonered and dis-'charged, and hereby not only exoner and discharge the said 'Boyd Dunlop, and his heirs and successors, and his cautioners 'in the said sequestration, of the said second dividend,' &c. 'And further, we do hereby, for ourselves and those for whom 'we act, ratify, approve, and confirm the whole actings, transac-'tions, management, and intromissions of the said Boyd Dunlop, 'as trustee foresaid, relative to the said bankrupt estate, at and 'prior to the 18th September last (1816), when the dividend was 'declared.'

From that period, viz. the 18th of September 1816 to December 1822, when Dunlop died insolvent, no further inquiry was made into the state of the trust, and his accounts were never audited. Soon after his death, it was discovered that he had intromitted with the funds of the estate to the amount of £2360; and Duncan, having been appointed trustee in his place, brought an action against Porterfield and Buchanan, founding on their bond of caution, and concluding against them for that sum, and for £2952 as interest at the rate of 20 per cent.

In defence against this action it was pleaded,

1. That as they entered into the cautionary obligation in reference to the provisions of the bankrupt statute, whereby the creditors, either by themselves, or by their delegates the commissioners, were bound to exercise a proper control and superintendence over the trustee, it was an essential condition of their bond that this should be done; but that both the creditors and their commissioners had been guilty of gross negligence in watching over the conduct of the trustee, and particularly in not bringing him to account in terms of the statute; and therefore, as this fundamental condition of their contract had been violated, they could not be bound by it; and,

2. That as certificates had been granted by the commissioners, and these had been confirmed by the discharge granted by the creditors, the defenders were entitled to rely upon the truth of them, and they could not be made responsible for the falsehood so stated by the commissioners, or for their neglect in not making due inquiry.

To this it was answered,

1. That, by the nature of the bond, the defenders became bound for the consequences of the trustee neglecting to perform his duty;

that it was incumbent upon them to keep a watch over his conduct, it being their peculiar duty so to do; that their bond was expressly to that effect, and it could not have been contemplated that this was to be done by the creditors, who in extensive sequestrations were generally dispersed, and resided at places distant from where the trustee had to act; and,

2. That the circumstance of the trustee having contrived to impose upon the commissioners was just a breach of that faithful conduct for which the defenders had become responsible.

Lord Alloway 'repelled the defences in so far as regards the 'principal sum pursued for,' and decerned accordingly; but appointed parties to be further heard as to the interest. Thereafter the question as to the interest having been discussed before Lord Eldin, and having advised a representation for the defenders as to the principal sum, he altered, and assoilzied them from the whole conclusions of the libel, 'in respect that the defenders, as cautioners for the deceased Boyd Dunlop in the sequestration of 'Richard Scougal and Company, had a right to rely upon the vigilance of the commissioners, and that of the creditors themselves, 'for preventing the funds from being embezzled by the trustee, and 'in respect the said commissioners and creditors have grossly 'neglected their duty to the cautioners, and have allowed the 'trustee to embezzle a great part of the funds, without taking 'the steps required to preserve them.'

The pursuer having reclaimed, the Court, without hearing the counsel for the defenders, adhered.

Lord Balgray.—This case appears to me perfectly clear. In this question we must regard the creditors as in the situation of a single individual; and if so, could it be maintained that, in the circumstances of the gross negligence displayed in this case, any claim could lie against the cautioners? Certainly not. But the commissioners are appointed by the creditors as their delegates for the very purpose of superintending the conduct of the trustee; and if these commissioners have violated their duty, the cautioners cannot be liable.

Lord Craigie.—I am of the same opinion. We must hold in law that the misconduct of the commissioners is that of the creditors; and it is impossible, in the circumstances of this case, that the creditors can maintain a claim against the cautioners.

Lord Gillies.—I concur in these opinions. Indeed, the argument for the pursuer seems to amount to this, that although the trustee and the creditors, or, what is the same thing, the commissioners, combine to commit a fraud, the cautioners must be liable for the trustee.

Lord President.—Where there is a duty imposed on a creditor, or

which, in point of law, he is bound to perform, it must be presumed that a party, in becoming a cautioner, relies on this being done. It cannot be held that thereby the creditor was to be allowed to neglect that duty. Accordingly there are numerous instances of the application of that rule in England, where they seem even to carry it further, and to free the cautioner. The same rule has also regulated the decisions as to bank agents.

Pursuer's Authorities.—Hamilton, June 18. 1706, (2091); Wallace, Feb. 20. 1707, (2096); Alexander, Dec. 6. 1671, (2089.)
Defenders' Authorities.—3. Ersk. 3. 66; Dick, Nov. 30. 1697, (2090); Thomson, Jan. 29. 1822, (ante, Vol. I. No. 319. as rev. June 9. 1824); Fell, 178. 185.

J. MOWBRAY, W. S.—A. SWINTON, W. S.—Agents.

HOUSTON'S EXECUTORS, Pursuers.—*Fullerton.*
J. C. PORTERFIELD and J. BUCHANAN, Defenders.—*D. of F. Moncreiff—Shaw Stewart.*

No. 75.

Cautioner—Sequestration—54. Geo. III. c. 137.—Held that where a cautioner for a trustee has been found not liable for his misconduct in respect of the gross negligence of the commissioners and creditors, it is not relevant to allege that the claim of a creditor had been rejected and was under discussion, and so could not interfere in the management of the estate, in respect he was not thereby deprived of his control over the conduct of the trustee.

Dec. 13. 1826.
1ST DIVISION.
Lord Eldin.
H.

THIS was a branch of the preceding case. The executors of Houston had claimed on the estate of Scougal and Company; but their claim was disputed, and it was under discussion in this Court during the period when Mr. Dunlop was in office as trustee, and intromitted with the funds which had been deposited in bank. In the above case they made appearance; and in addition to the arguments maintained on the part of the pursuer, they contended that, as their claim had been rejected, they were deprived of any control over the trustee, and therefore the defences of the cautioners could have no effect against them. The Court, however, holding that although their claims were under discussion, they had a right to exercise a superintendence over the trustee, and to have interfered equally as well as any other creditor, adhered to the interlocutor of the Lord Ordinary assoilzieing the cautioners.

Defenders' Authority.—2. Bell, 381.

J. SMYTH, W. S.—A. SWINTON, W. S.—Agents.

No. 76. Mrs. SUTHERLAND and Others, Pursuers.—*Jameson—J. M'Donald.*
Mrs. FRASER and Others, Defenders.—*Cockburn.*

Decree of Constitution.—Circumstances under which decree of constitution was pronounced, sisting execution.

Dec. 13. 1826.
1ST DIVISION.
Lord Meadowbank.
S.

THE pursuers, as representing the late George Mackay, brought an action against the defenders, the heirs of the late John Fraser, writer to the Signet, concluding for £227. 19s. In support of this claim, they founded upon a docqueted account prepared in a submission between Mackay and the tutor of Lord Reay, whereby Fraser acknowledged that, as agent of Mackay, he was indebted to him in the above sum; and the arbiter pronounced decree to that effect. In defence, it was maintained that Fraser was no party to the submission; and at all events, as he had been merely the agent of Mackay as factor for the trustees of Lord Reay, and as there was a process of multiplepoinding and exoneration depending in Court, in relation to the claims of the respective parties against each other, this process ought to be sisted till the issue of the multiplepoinding.

The Lord Ordinary sisted process accordingly; but the Court altered, and pronounced decree of constitution, sisting execution in the mean while.

C. M'DONALD, W. S.—J. MOWBRAY, W. S.—Agents.

No. 77. J. HALLIDAY, Suspender.—*Sol.-Gen. Hope—Graham Bell.*
T. HALLIDAY, Charger.—*D. of F. Moncreiff—Marshall.*

Oath—Intrinsic or Extrinsic.—Held, that an allegation that a bill had been granted in fulfilment of a promise to pay a tocher, was extrinsic, and no other value being alleged, that the bill was not onerous.

Dec. 13. 1826.
1ST DIVISION.
Lord Eldin.

JAMES HALLIDAY having been charged on a bill accepted by him for £480 in favour of the charger, his son-in-law, presented a bill of suspension, alleging that he had received no value for it, and that it had been obtained from him under circumstances of fraud. He further stated, that he was a person considerably advanced in life, was in poor circumstances, and had never possessed more than £500; that the charger was a common labourer, to whom he had intrusted the management of a farm of which the suspender was tenant, and that it was never in his power to have given value for that bill. These allegations having been denied, the suspender made a reference to the oath of the charger, who accordingly emitted a deposition. After giving a history of

various small money transactions between them, he was 'interrogated and desired to say, whether, upon the date of the bill 'charged for, he gave the suspender, or paid him down in cash, 'any value therefor.'

To this he answered, 'That, before his marriage with the suspender's daughter, he promised to give the deponent £500 as 'his daughter's tocher; and a good while after the deponent went 'to reside at Birkshaw, he demanded payment of that sum from 'the suspender, upon which the suspender said that he would 'only give him £480, and that if he would go to Lockerby, and 'get a bill written out for that sum, he the suspender would accept it; and the deponent did accordingly go to Lockerby, and 'got the bill charged on written, and in the deponent's presence 'the suspender accepted that bill of the date it bears, viz. the 2d 'of February 1824.'

On advising the oath, Lord Medwyn found it negative, and refused the bill; but the Court passed it without caution or consignation.

On the part of the suspender it was then contended,

1. That the allegation that he had come under an obligation, prior to the marriage of his daughter, to pay to the charger the sum of £500 as tocher, and that the bill had been subsequently granted in implement of that obligation, was extrinsic; that as he denied that he had ever done so, the charger could not establish it by his own oath, and therefore the bill must be considered as having been granted without value.

2. That considering the relative situation of the parties, such an allegation was utterly incredible; and as the bill had been obtained under circumstances strongly indicative of fraud, the charger had made oath in the above terms, merely with the view to carry that fraud into effect; and,

3. That even supposing that his allegation were to be held as true, it was not competent to constitute a debt of that nature by bill.

To this it was answered,

1. That as it was proved by the bill that the suspender was indebted to the charger in the sum there mentioned, it was incumbent on him to establish clearly that no such debt existed; that accordingly he had referred that fact to the oath of the charger, who had deponed that the bill was granted for an onerous and lawful consideration, namely, the tocher which was to be payable on the marriage of the charger with the suspender's daughter, and on the faith of which the marriage had taken place; that this was intrinsic, and therefore the suspender had not proved his allegation.

2. That the only relevant subject of inquiry was not as to the credibility of the statements made in an oath, but as to what had been deponed to; that, however, it appeared from a state of the affairs of the suspender that he was perfectly able to have afforded such a tocher; and,

3. That there was no objection to such a debt being constituted by bill.

The Lord Ordinary suspended the letters simpliciter, and found expenses due, 'in respect that the conduct of the charger was apparently intended for the purpose of evading the truth, and defrauding the suspender of his property, in which he would have succeeded, if he had not been prevented.'

The charger having reclaimed, the Court remitted the case to the Lord Ordinary to form part of the trials of Lord Probationer Newton; and thereafter, upon his report, adhered upon the ground stated in the Lord Ordinary's interlocutor; and also, 'in respect of the further reason that the allegation by the charger in his oath, as to the original ground of the supposed debt or obligation, is extrinsic to the point referred to the said oath.'

The Lord Probationer was of opinion, that, in the peculiar circumstances of this case, an inquiry should be made into the state of the suspender's funds, and that for that purpose a condescendence should be ordered.

Lord Balgray.—There are two views in which this case may be considered,—either as resting on a downright fraud, or on the interpretation of the oath. If we are to place our judgment on the former of these grounds, there ought to be further investigation; but I think that unnecessary. There has been here a reference to oath, and we must judge as to the import of it by the oath alone. Now what the charger says is, that he, a labourer, married the suspender's daughter; that he gave no actual value for the bill, but that he got the promise from him of a tocher with his daughter of £500. But this allegation cannot be established by his own oath; and therefore it is an extrinsic quality which he must prove aliunde. Being extrinsic, and no other species of value being alleged, the letters must be suspended.

Lord Craigie.—I am entirely of the same opinion. Where a party, in an oath, refers to a separate obligation as creating a ground of debt in his favour, he must prove it otherwise than by his own oath; and that is the situation in which the present case stands.

Lord Gillies.—I think the interlocutor quite right, that there was a palpable fraud, and that there is no necessity for further inquiry. The charger says that this poor old man promised to give a tocher of £500 to this person, who is a common labourer, and that this was

to be paid during his life. If we were to hold such an allegation intrinsic, any party might constitute a debt in his own favour, and recover it in the way attempted here. But it is quite extrinsic, and therefore no regard can be paid to it.

LORD PRESIDENT.—I conceive that the law of extrinsic and intrinsic is this, that when the party swears that there was a certain stipulation or obligation in his favour forming pars ejusdem negotii, it will be intrinsic, otherwise not. If this bill had been dated prior to the marriage, and it had been sworn that it was given at that time, and constituted the tocher, the charger might have had a better case. But this is not what he depones. He swears that it was given to him long subsequent to the marriage; so that his allegation of a promise rests upon his own assertion alone, and is entirely extrinsic.

W. DOUGLAS, W. S.—J. M'CRACKEN,—Agents.

Miss M. M. BRUCE, Pursuer.—*Bell—Skene—H. Bruce.* M. BRUCE, Esq. Defender.—*D. of F. Moncreiff—Sol.-Gen. Hope—A. Wood.*

No. 78.

Implied Obligation—Passive Title.—A father having conveyed his estate to his son by a mortis causâ disposition, subject to his debts, and a provision to his daughter, for the payment of which the son was to be personally bound by acceptance thereof; and he having accepted and entered to possession, and intromitted with his father's effects—Held that the son did not make himself liable to any greater extent than to count and reckon with the daughter for his intromissions.

Dec. 13. 1826.

1ST DIVISION. Lord Meadowbank. 8.

THE late Patrick Crawford Bruce, Esq. who resided in England, and was proprietor of the estate of Glenelg in Scotland, made up, with a view to the settlement of his affairs, a state of them, from which it appeared that he conceived he had a clear reversion of upwards of £162,000. On this subject he had previously addressed a letter to the defender, his eldest son, in which, after mentioning that he was to make certain provisions in favour of another son and two daughters, (of whom the pursuer was the eldest,) he stated, 'that fortune having been propi-'tious, and you being primogenitus, and considering that there 'is wherewithal to establish a family, you therefore, under the 'whole of the foregoing circumstances and considerations, are 'likely to possess the great division or portion of my fortune.' In a letter to his agent in Scotland, relative to the preparation of his deed of settlement, he informed him that 'my intentions are, that 'my landed property in England and Scotland shall be equally 'liable with my personal estate for the payment of my debts, 'whether on heritable security, bond, or note of hand; that they

'shall also be liable to the patrimonies or provisions I may make 'to my younger children,—to the dower or jointure I may give 'to Mrs. Bruce,—and, in short, that no preferable right is to vest 'in my eldest son or heir at law, whoever he may be, until pro-'vision is first made for my debts, legacies, and bequeathments 'of every description; and that then, but not till then, he can 'claim a separate and first right to Glenelg.'

Accordingly, on the 10th of July 1819, he executed a deed of settlement in the Scottish form, by which he conveyed his estate of Glenelg to the defender, subject to the burden of his debts, and payment to the pursuer of the sum of £20,000, and the further sum of £500 per annum on the death of her mother, and while she remained single and unmarried; besides certain other provisions in favour of his other children. By a clause in the deed he appointed these burdens 'to be inserted in all charters and in-'feftments to follow hereon, and in all transmissions of the lands 'and others above conveyed, so long as the said burdens shall 'remain unpaid, and that under the pain of nullity.' And he inserted a further declaration in these terms:—'All which debts, 'annuities to my wife and eldest daughter, and provisions to my 'younger children above mentioned, the said Michael Bruce, and 'the heirs succeeding to him as aforesaid, shall also, by accept-'ance of these presents, be personally bound to pay.'

Besides this deed, Mr. Bruce executed a will in the English form, by which he conveyed the whole of his property, real and personal, situated in England to the defender, subject to the above burdens. Mr. Bruce died on the 31st March 1820, and the defender thereupon obtained himself served heir—made up titles to the estate of Glenelg—entered to possession—proved the will in England, and intromitted with the whole effects situated there, which were sworn to as not exceeding £70,000.

After the lapse of five years, the pursuer raised an action against the defender, in which she concluded, 1. To have it declared that the above provisions in her favour formed real burdens upon the estate of Glenelg; and, 2. That the defender should be ordained to pay to her the provision of £20,000, and also the annuity of £500, in terms of the deed of settlement. Decree of declarator was allowed to be pronounced to the above effect; but the defender having resisted the petitory conclusion, the pursuer, in support of it, pleaded,

1. That in virtue of the condition annexed to the disposition and deed of settlement, whereby the defender was declared to be personally bound by acceptance to pay the provisions made in her favour, and in consequence of his acceptance of that disposi-

tion, and of having entered to and enjoyed possession, she was constituted his personal creditor for the provisions; and,

2. That as he had served heir to his father, and intromitted with his whole means and effects, he was liable on the passive titles.

To this it was answered,

1. That the deed of settlement had been made by Mr. Bruce on the supposition, not only that he was perfectly solvent, but had a large reversion, whereas it had turned out that his estate was inadequate to pay his debts;—that it was plainly his intention that the provisions to the pursuer and the other members of his family should only be payable in the event of there being funds for that purpose;—that in point of fact there were no such funds, and therefore no personal liability could attach to him, and that he had always been willing to count and reckon for his intromissions; and,

2. That as the pursuer was a mere gratuitous legatee or disponee, and not a creditor of Mr. Bruce, she had no right to found on the passive titles, to the effect of rendering the defender personally liable.

The Court, on the report of the Lord Ordinary, found 'that 'the suspender is not liable ultra valorem of the estate and effects 'belonging to his deceased father, and proceeds thereof; and re-'mitted to the Lord Ordinary to proceed accordingly.'

Lord Balgray.—In judging of this case, we must have regard both to the deed of settlement executed by Mr. Bruce relative to his heritable estate here, and his effects in England, so as to ascertain what his intention was. He gave his estate to his eldest son, subject, no doubt, to the burdens founded on by the pursuer; but it is perfectly plain that he did not intend that any responsibility should attach to him, if in truth there were no such estate. The defender was thereby placed in the situation of an ordinary trustee, and it was out of that estate that the provision was to be paid. The utmost, therefore, which the pursuer can demand is, that the defender shall count and reckon with her for the value of that estate.

Lord Gillies.—I am of the same opinion. The service of the defender, no doubt, renders him liable to pay the debts of his father; but the claim of the pursuer is not of the nature of a debt: it is an ordinary gratuitous provision or legacy. Both parties rest on the deed of settlement; and, in construing it, we must inquire into what was the will or intention of Mr. Bruce. It is impossible, however, to hold that he could ever have contemplated that the defender should, under the existing circumstances, be personally liable for the provision bequeathed to the pursuer.

Lord Craigie.—I concur in the opinions which have been delivered.

Two grounds of liability have been maintained by the pursuer; first, the acceptance of the deed, and second, the passive titles. As to the first of these grounds, I am clear that it cannot infer any further personal responsibility than to account for the funds actually intromitted with, just as if the defender were a trustee. It was so decided in the case of Smith *v.* Marshall—a decision which proceeded on general principles, and agreeably to the opinions of Lords Braxfield and Monboddo. But the defender does not dispute that he is liable so to account.

LORD PRESIDENT.—I am of the same opinion. With regard to the passive titles, the disposition of the law has, in more modern times, been to relax the strict liability formerly inferred by intromission, even in a question with onerous creditors. But the pursuer is merely a gratuitous disponee, and cannot insist for more than a fair accounting.

Pursuer's Authority.—2. Ersk. 3. 49.

Defender's Authorities.—Kames' Pr. Eq. 149. 159. 201; Pringle, Feb. 1. 1671, (6374); D. of Lauderdale, Dec. 19. 1684, (6379); Kettlestone's Daughters, Feb. 1688, (6376); Smith, July 21. 1780, (2322); 1. Stair, 7. 13; 1. Stair, 5. 13; 3. Stair, 6. 1; 3. Stair, 7. 13; 3. Stair, 9. 7; 2. Bank. 427; 3. Ersk. 8. 50; Gordon, Jan. 27. 1789, (9733); Crs. of Blair, May 13. 1791, (9734.)

J. GREIG, W. S.—A. SWINTON, W. S.—Agents.

No. 79.

MELDRUM'S TRUSTEES, Pursuers.—*Forsyth.*

A. CLARK, Defender.—*Tawse—J. Henderson jun.*

Trust—Consignation.—An acceding creditor to a voluntary trust, under which the trustee had entered into possession of the estate, having obtained from the bankrupt a quantity of grain and sold it, held not entitled to set off the price against his debt, or retain it in payment of his dividend, but bound, in an action at the instance of the trustee, to consign the whole amount, without deduction of part which he had failed to recover, or of payments made to the bankrupt without authority of the trustee.

Dec. 13. 1826.

2D DIVISION. Ld. Cringletie. B.

MELDRUM having executed a trust-deed in favour of the pursuers for behoof of his creditors, it was acceded to by the defender Clark. The trustees for some time allowed Meldrum to manage his estate, but afterwards appointed a factor, who entered into possession. Some time subsequent to this appointment, Meldrum, without authority of the factor or trustees, delivered to Clark a quantity of grain, the produce of the estate, with instructions to sell it, which Clark accordingly did for the sum of £256.

The trustees having brought an action against Clark for payment of the price, he pleaded in defence that he was entitled to impute it in extinction of a debt alleged by him to be due by Meldrum, which formed the subject of dispute in a multiple-

pointing raised by the trustees; or at least to retain it to answer the dividend to which he might be entitled out of the trust-estate. The Lord Ordinary appointed the sum sued for to be immediately consigned, observing in a note,—'The defender got hold 'of the grain, for the price of which he is now pursued, as the 'property and part of the trust-estate. He must therefore pay 'it to the trustees; and, as in other cases, if he have any claim 'against the estate, which seems doubtful, he must claim it on 'the trust-funds.'

Against this interlocutor Clark reclaimed, and contended that he was at least entitled to deduct from the amount to be consigned a part of the price which he had not actually recovered, and two sums paid to the truster Meldrum and his brother. To this it was answered for the trustees, That having intromitted with the trust-property without authority, and particularly having sold the grain to a person in insolvent circumstances, (as had been the case,) he was bound to account for the full price; and that the alleged payments, if they had been made, were totally unauthorized by the trustees. The Court unanimously adhered.

T. WALKER,—A. STEVENSON, W. S.—Agents.

F. GARDEN, Advocator and Defender.—*Jeffrey—Neaves.*
H. M'COLL, Respondent and Pursuer.—*More—M'Gachen.*

No. 80.

Legal Diligence.—A creditor having executed a caption against his debtor, without indorsing a restriction to the balance to which the debt had been reduced by partial payments since the date of the letters, and the messenger, who was likewise employed as an agent to procure a settlement of the debt, having taken his prisoner to the office of the creditor's agent, instead of directly to gaol, without any application to that purpose from the prisoner, though not against his will, held that the creditor was liable in damages.

Dec. 13. 1826.
2D DIVISION.
Lord Mackenzie.
B.

M'COLL, the respondent, was debtor to the sequestrated estate of Cochrane, Davidson, and Company, merchants in Glasgow, in a joint promissory note with one Monkhouse for £47. On this note Garden, the trustee on the estate, charged M'Coll, and thereafter raised letters of horning; and, of date October 4. 1814, likewise took out letters of caption. At this period no part of the debt was paid; but on the 6th £12 were paid to account by Monkhouse, and on the 28th a poinding was executed of certain goods, to the value of about £30, in possession of Monkhouse, and the usual warrant of sale obtained, but was not followed out, in consequence of a claim raised by a third party, alleging himself the true proprietor of the goods. In the beginning of November, however, other partial payments were made by Monkhouse, who

was in fact the principal debtor, which reduced the debt to about £19. While matters were in this situation, Garden put the caption into the hands of a messenger, without marking any deduction of the payments to account. This messenger had previously been employed to obtain a settlement from M'Coll, and he deponed (in a proof allowed in the Inferior Court) that, on going to M'Coll's shop to execute the caption, he asked him 'if he was 'going to settle the debt?'—and that 'the pursuer M'Coll having answered that he was not going to settle it, the deponent 'told him, that as he had disregarded the messages the deponent 'had formerly carried to him, he was the deponent's prisoner until he made a settlement, and that he must go to the office of 'Mr. M'Dowall (Garden's agent) to make a settlement;' and the messenger accordingly went through the forms of apprehension. M'Coll, however, as stated by himself in his judicial declaration, 'did not on this occasion ask the messenger for a state of his 'claim, or tender to him any money in payment thereof;' but 'as soon as the messenger told him he was his prisoner, and that 'he must go to Mr. M'Dowall's office, he rose and took his hat, 'and readily said he would go there with him.' He accordingly set out for M'Dowall's office, proceeding through the most unfrequented lanes and streets, followed at a short distance by the messenger, and by the concurrents at such a distance, that he was not aware of their attendance. On reaching the agent's office, M'Coll was desired by him to pay the balance on the bill; and after complaining of being apprehended, notwithstanding the poinding of Monkhouse's goods, he promised to pay the balance on the Tuesday following; on this he was liberated, having been detained in all about a quarter of an hour. M'Coll accordingly paid up the balance as promised by him; but a few months thereafter he raised an action against Garden before the Magistrates of Glasgow, concluding for £200 as damages for wrongous imprisonment, on the grounds,

1. That as partial payments had been made prior to the execution of the caption, and as poinding had been used of the co-obligant's property to an extent which covered the whole balance unpaid, it was incompetent to apprehend the pursuer at all.

2. That at all events it was incompetent to apprehend him for the full debt without indorsing on the caption, and deducting the partial payments made to account; and,

3. That the messenger was not entitled to convey the pursuer to M'Dowall's office, but was bound to have taken him at once to gaol.

Against this action it was pleaded in defence by Garden,

1. That being prevented by the claim of the third party alleging right to the poinded goods from proceeding to sell them, at least without incurring the expense of a litigation, he was entitled to go on with his personal diligence against the pursuer.

2. That, according to legal principle, a debtor is apprehended, not for payment of any particular sum, but for disobeying the charge, and consequently, so long as any part of the debt remains unpaid, he may be legally apprehended under the letters of caption; and that the only purpose of furnishing the debtor with a state of the balance due is, that by immediate payment he may obtain liberation; but that as a messenger is not entitled to receive payment, there is no necessity for producing a state of the debt till the prisoner is booked in the gaol books, where only he can obtain liberation by payment to the gaoler, who alone is legally authorized to receive such payment; and that, in the case of Leslie *v.* Pringle, the debt had been booked for the full amount, after a partial payment had been made; and,

3. That the pursuer was not taken to M'Dowall's office against his will, but, according to his own admission, went 'readily;' and that the conduct pursued by the messenger in regard to this was much less prejudicial to the pursuer's feelings and credit, than if he had carried him at once to gaol.

The Magistrates having awarded £50 of damages on the two last grounds maintained by the pursuer, with expenses, Garden brought an advocation, in which the Lord Ordinary altered the interlocutor, so far as to find Garden liable in £5 of damages only. Garden, however, still reclaimed, and contended that no damages whatever were due; but the Court, by a majority, adhered.

Lord Justice-Clerk.—I do not think that the question is necessarily raised, whether the execution of a caption, without deduction of payments made subsequent to the date of the letters, be illegal, as no imprisonment followed, and as on the other point there are sufficient grounds for adhering to this interlocutor. The messenger here, as clearly appears from his own deposition, was employed as agent under M'Dowall to obtain a settlement; and when the caption was put into his hands, it was his duty, on not obtaining a settlement, to take the prisoner to gaol, unless he expressly asked to be taken elsewhere. The messenger at once told the prisoner that he *must* go to the agent's office; and this is not done away by the prisoner going readily. It was an illegal use of the diligence, unless the proposition came from the man himself; and I do not care whether it was more for the advantage of the pursuer to be taken to the office, or to prison. Laying aside, therefore, the question as to the caption being for more than the debt due, I agree with the

Lord Ordinary that damages ought to be awarded, and that £5 is a proper amount.

Lord Alloway.—I concur entirely in the opinion which has been delivered; but as the other point is one of importance, I think it right to state my views on it also. The party here was apprehended for £47, but at the time £19 only was due; and the messenger (who, it is clear, acted also as agent) ought to have informed the pursuer, who was only a cautioner, and could know nothing of it, that so much had been paid. I do not care whether the messenger had carried him to prison or not, or whether he had him booked or not; it is enough that he was apprehended for the full debt when only £19 was due.

Lord Pitmilly.—I also agree in thinking that this point cannot be thrown out of view. There was a great irregularity in apprehending for the full debt, when a part only was due. There is no objection to putting the same caption into effect, but the partial payments should have been acknowledged before apprehending. The mere fact of apprehending for a larger sum than was due was irregular; and some damages are necessary on that account. I also agree as to the other point, as it appears to me that this party did not ask to go to the agent's office, but that the messenger told him that he *must* go.

Lord Glenlee.—I rather think that the pursuer was very well pleased to go to M'Dowall's; and I doubt if it would do debtors any good, to leave the messengers no alternative but to carry them at once to gaol. No doubt, to carry a prisoner to another place against his will is an illegal act; but I doubt if that was the case here. As to the other point, there is no such thing as arresting a debtor for any particular sum more than another. He is arrested for disobeying the charge. It is certainly proper, however, that he should know immediately how much he requires to pay in order to get free; and it was a rash step in Garden not to give a note of the precise amount still due. But I am not satisfied of the propriety of finding any damages due; although, if any are to be given, the sum awarded by the Lord Ordinary is as moderate as possible.

Respondent's Authority.—Leslie, Nov. 18. 1761, (F. C.)

Campbell and Macdowall,—J. Pattison Junior, W. S.—Agents.

A. OSWALD, Pursuer.—*D. of F. Moncreiff—Wilson.*
J. PATISON, Defender.—*Skene—Brown.*

No. 81.

Jurisdiction.—Held that an arrestment jurisdictionis fundandæ causâ is effectual to constitute a jurisdiction against a native Scotchman domiciled abroad, in an action at the instance of a Scotchman also residing abroad, and where the transactions on which the action was founded arose beyond the territory of the Court.

Dec. 14. 1826.

1st DIVISION. Lord Meadowbank.

THE pursuer Alexander Oswald was a native of Burntisland in Scotland, but was now settled as a merchant in Bordeaux in France. The defender Patison was a native of Leith, but was settled as a merchant in Charlestown, America. These two parties having had several commercial transactions, on which Oswald alleged that a balance had arisen in his favour, and having learned that Patison had funds in this country, he caused them to be arrested, jurisdictionis fundandæ causâ; and thereupon raised an action in this Court, concluding for the balance, and on the dependence of which he raised and executed arrestments ad effectum.

In defence Patison maintained, that as both parties were domiciled abroad, and as all the transactions on which the action was founded had taken place in France and America, and as all the necessary evidence of their mutual claims was in these countries, this Court had no jurisdiction to entertain the action.

To this it was answered,

1. That the defender being a Scotchman, and the Court of Session being the commune forum for all native Scotchmen abroad, even although residing there animo remanendi, the action was perfectly competent; and,

2. That at all events, and even supposing the defender were to be regarded as a foreigner, still a proper jurisdiction had been constituted by the arrestment.

The Court, on the report of the Lord Ordinary, and also of Lord Probationer Newton, sustained the jurisdiction, and remitted to the Lord Ordinary to proceed accordingly.

LORD PROBATIONER.—In general the jurisdiction of a Court depends on the defender being within its territory. In regard to a pursuer, a jurisdiction exists over him by the circumstance of his coming to the Court, and demanding justice from it. Independent of every other circumstance, however, there is here an arrestment jurisdictionis fundandæ causâ—a process which we have adopted from the Continent. It may be extremely doubtful, however, whether the jurisdiction thereby constituted can extend further than over the funds arrested. But it is sufficient to constitute such a jurisdiction as to compel the defender to come here, and defend the fund so arrested. The jurisdiction ought therefore to be sustained.

The Judges were unanimously of opinion that the objection to the jurisdiction ought to be repelled.

Pursuer's Authorities.—1. Ersk. 2. 19; Galbraith, Nov. 15. 1625, (3813); Blantyre, Dec. 8. 1626, (4813); 2. Voet. 4. 93; Young, Dec. 1683, (4833); Elvis, Dec. 1610, (4833); Ford, Nov. 21. 1758, (4835); Ashton and Co. June 1773, (4835.)

Defender's Authorities.—Brog, March 26. 1639, (4816); Bromley, Feb. 1682, (4817); Scott, Dec. 9. 1797, (4845.)

H. SIBBALD, W. S.—J. PATISON, W. S.—Agents.

No. 82.

J. KYLE, Pursuer.—*D. of F. Moncreiff—Christison.*
D. KYLE, Defender.—*Sol.-Gen. Hope—Boswell.*

Interdiction—Sale.—Held that a sale of a property by an interdicted party to one of his interdictors, for an onerous and rational cause, is effectual.

Dec. 14. 1826.
1ST DIVISION.
Lord Medwyn.
S.

THE late Robert Kyle of Davidshill had a brother, William Kyle of Lynn. Robert was married, but had no family. William was twice married. By his first marriage he had two sons,—the pursuer John Kyle (who was the eldest,) and William Kyle junior; and by his second marriage he had a son David, the defender.

Four years prior to this deed, viz. on 15th March 1800, Robert Kyle, on the narrative of his being of a very facile and pliable disposition, executed a bond of interdiction in favour of William Kyle of Lynn, and two other parties as his interdictors, which was published and registered on the 20th of that month, and the 1st of April following. Immediately thereafter an action of reduction, on the ground of facility and lesion, was brought in name of Robert Kyle and his interdictors, of a lease which he had granted in 1789 in favour of one Kerr for three 19 years, renewable from time to time on payment of a small grassum, and of a rent of £14 for the first nine years, and of £15 for the remaining period; and the Court, on advising a proof, sustained the tack for nineteen years at the above rent, but reduced it quoad ultra.

Soon thereafter, viz. on the 20th of July 1804, Robert Kyle executed a disposition of Davidshill in favour of William Kyle of Lynn, and his second son William junior, in joint fee and liferent, and to the survivor in fee; whom failing, the eldest son of the second marriage. The disposition narrated, that it had been granted 'in consideration of the said William Kyle having 'paid the debts due by me preceding the term of Whitsunday 'last, and of the annuity after mentioned to be paid by them to 'me and my wife, and for payment of which I have received an

'heritable bond of annuity from the said William Kyle for him-'self, and as acting for his said son;' and it also stated that it had been granted for love and favour. The annuity alluded to was of £20 in favour of Robert Kyle and his wife, payable out of the lands of Davidshill till Whitsunday 1809, and thereafter £30 during their lives. Sasine was taken on these respective deeds, and duly recorded.

About the same time William Kyle granted a disposition mortis causâ of his lands of Lynn, and also of his whole means and effects, to his eldest son, the pursuer, subject to considerable burdens in favour of the other members of his family, with the exception of his second son William; and in virtue of this deed, the pursuer, on the death of his father, (which happened very soon thereafter,) made up titles to Lynn, entered to possession, and intromitted with the whole of the personal estate.

On the death of William Kyle, his second son William entered to possession of Davidshill, and paid the annuity till 1810, when Robert Kyle died; and he continued to do so to his widow till his own death in 1816. The defender David Kyle then made up titles as heir of provision to the lands of Davidshill, and entered to possession. In 1821, the pursuer, as the heir at law of Robert Kyle, brought an action of reduction of the disposition executed by him in 1804, on the head of deathbed, ex capite interdictionis, and facility and fraud.

Lord Eldin, on advising a proof as to the plea of deathbed, reduced and decerned in terms of the libel; but the Court altered, repelled that plea, and, before further answer, 'remitted to 'the Lord Ordinary to receive a condescendence of the facts which 'are averred and offered to be proved respecting the onerosity 'of the deed.'*

In support of his allegation of onerosity, the defender stated that Robert Kyle having, prior to 1800, contracted considerable debts, and the lease being a most injurious transaction for him, William Kyle of Lynn had agreed to pay these debts, and also the expenses of the reduction of the lease, and to grant an heritable bond of annuity to him and his wife and the survivor for £20, to be increased to £30 in the event of the lease being reduced:—that, with the view of raising this action, it had been considered expedient that Robert should grant the bond of interdiction, so that the action might be pursued by him and his interdictors:—that William had paid the debts to the extent of upwards of £200, and the whole expenses of the action; and that he and the

* See ante, Vol. III. No. 462.

other disponees had regularly paid the stipulated annuity. He further stated, that the disposition of Lynn to the pursuer, and the whole personal effects, had been made on the faith of the validity of the disposition of Davidshill in favour of William, the second son, and that both were regarded as forming one general family settlement. He therefore contended,

1. That as the value of the estate in 1804 did not exceed the amount of these advances and the worth of the annuity, the disposition which was subsequently executed in 1804 was onerous and rational, and therefore that the objection of its having been granted in favour of an interdictor was not well founded; and,

2. That the pursuer was barred, in the circumstances, from objecting to it.

On the other hand, it was denied by the pursuer that any such agreement had been made prior to the interdiction; that any evidence of it had been produced, or of the alleged advances; or that, even supposing they had been made, that they were at all adequate to the value of the estate; or that there was any intention that the disposition of Davidshill should be the consideration of that of Lynn in his favour. He therefore contended,

That as it was admitted that his father William had been constituted an interdictor in 1800, and the deed in question had been granted to him by the interdicted party in 1804, he stood in a situation which rendered any such deed illegal, even although it had been granted for an onerous cause; and that, as no onerosity had been proved, it was a fortiori objectionable.

The Lord Ordinary reported the question on Cases; and the Court, in respect that the transaction was both rational and onerous, assoilzied the defender, and found expenses due.

Lord Balgray.—The decision of this case depends on whether the transaction was onerous and rational. The circumstance of a party being under interdiction does not prevent him from selling his property, provided it be done for a proper and onerous cause. The purpose of the interdiction is to protect him against being entrapped into gratuitous obligations. In this case the interdiction appears to have been executed for the purpose of reducing the lease, by which, in effect, Robert Kyle was deprived of his property; and his brother William, with the approbation of all the friends, appears to have stepped forward with the view to secure this property to the family. He paid Robert's debts, the expenses of the action, and granted a bond of annuity; and therefore being, in my opinion, both a rational and onerous transaction, I think it ought to be sustained.

Lord Craigie.—There is a great deal of statement on the one side, and contradiction on the other; but I think we have sufficient ma-

terials to decide this case; and I have arrived at the same conclusion as Lord Balgray. The existence of the previous agreement is not distinctly denied; but it is merely said that there is no evidence of it. Perhaps it was not reduced to writing; but we see that William acted on the faith of it, and paid various debts, and the expenses of the action of reduction, and bound himself to pay a specific annuity; so that there was a clear rei interventus.

Lord Gillies.—I have considerable difficulty in this case. I do not think that there was any actual fraud; and I am disposed to believe that the transaction was a beneficial and proper one, on the supposition that the defender's statements are correct. But the most material of them are pointedly denied. Such being the case, and the fact being undoubted that this was a sale by an interdicted party to one of his interdictors, I think we cannot support it until we have the matter cleared up by a proof.

Lord President.—There is certainly great hazard in countenancing any deed executed by a party under interdiction in favour of an interdictor; and in all cases the latter must show clear onerosity and rationality. This, I think, has been made out in the present case.

Pursuer's Authority.—1. Ersk. 7. 58.
Defender's Authorities.—1. Ersk. 7. 58; Dingwall, July 12. 1749, (7152.)

Macmillan and Grant, W. S.—W. Patrick, W. S.—Agents.

Rev. Dr. Davidson, Petitioner.—*Brown.*
T. Falconer, Respondent.—*Keay—J. W. Dickson.*

No. 83.

Sequestration—Trustee—Process.—The creditors of a tenant sequestrated under the Bankrupt Act having agreed that the landlord should have a preference over the proceeds of the effects hypothecated to him for his rent on allowing them to dispose of them, and it being alleged that sufficient funds had been realized, but had been paid away by the trustee—Held that it was competent to enforce such a claim by a summary complaint, and that the successor of a trustee is liable for the obligations of his predecessor; but a remit made to ascertain the fact whether there were free proceeds.

Dec. 14. 1826.
1st Division.
Lord Medwyn.

Dr. Davidson having obtained a warrant of sequestration of the crop and effects of his tenant Duncan Weir in security of the rent of the year 1821, and also a decree of removing, applied to the Sheriff to appoint a factor to reap and ingather the crop; and a Mr. Boog was named accordingly. In the mean while a sequestration of the estates of Weir under the Bankrupt Act had been awarded, and Walter Falconer was appointed trustee. Thereafter, on the 29th of August 1821, Mr. Patison, agent for the trustee, addressed this letter to Dr. Davidson's factor:—'I 'am desired by Walter Falconer, trustee confirmed on the se- 'questrated estate of Duncan Weir, to request from you a state

'of the rents due to the Rev. Dr. Davidson for the farm and 'limeworks of East Camp, that when the same is adjusted, they 'may be paid from the first proceeds of the estate.

'On your agreeing to drop all further procedure in the process 'you have lately raised before the Sheriff, for the purpose of 'having a judicial factor appointed, and allowing the trustee to 'go on and manage the crop, &c., it shall be understood that your 'doing so shall not at all affect the rights of Dr. Davidson pre-'sently existing, but that the same shall remain entire.' To this the following answer was immediately returned:—'Mr. George 'Brown, Fountainbridge, has just now been here with a letter 'from you to him, from which it appears that you, as law-agent 'and acting for Mr. Walter Falconer, the trustee on Duncan 'Weir's estate, offer terms of arrangement regarding the manage-'ment of the crop on the farm of Hyndlaw, on this management 'being allowed to remain in Mr. Falconer, in regard to his cut-'ting down and ingathering the crop, &c., on Mr. Brown's agree-'ing, on the part of Dr. Davidson, to drop all further procedure 'in the application to the Sheriff for having Mr. Boog intrusted 'with the management of this crop, it being understood that his 'doing so shall not at all affect the rights of Dr. Davidson pre-'sently existing, but that the same shall remain entire.

'On the part of Dr. Davidson, I hereby pass from and withdraw 'the application to the Sheriff for having Mr. Boog intrusted with 'the management of the crop, reserving always entire to Dr. David-'son all his existing claims of preference on said crop, which shall, 'by his doing so, not be affected thereby.' In consequence of this agreement, the trustee reported to a meeting of the creditors, 'That he had effected an arrangement with Mr. Brown, factor 'for Dr. Davidson, and that in consequence he had been allowed 'to ingather the crop on the bankrupt's farm; that he had ac-'cordingly done so, and that the whole corn crop, with the ex-'ception of five and a half acres of barley, had been got in, in 'good condition;' and at a subsequent meeting he was authorized to sell the stock by public roup, which he accordingly did; and he afterwards reported that he had realized the proceeds, amounting to £265. Dr. Davidson, in the interim, had lodged a claim for a preference of £215; but it appeared that the trustee had incurred law expenses and other charges which almost exhausted the funds. He died in May 1823, and his brother Thomas was then elected in his place.

Dr. Davidson having been unable to recover payment of his claim, presented a petition and complaint, praying, inter alia, that Thomas Falconer, the trustee, should be ordained to lodge a

state of his accounts, and further, and at all events, 'to make 'payment to the petitioner of the sum of £215: 11: 3, being the 'amount of the debt admitted to be preferable, with interest from 'the time it ought to have been paid out of the first proceeds of 'the estate.'

To this demand it was answered,

1. That as the transaction took place with a former trustee who had intromitted with the funds, and the respondent did not represent him, and as free funds had not been recovered, he could not be made responsible for the debt; and,

2. That, from the nature of the claim, it resolved into an ordinary claim of debt, and therefore it was not competent to constitute it against the respondent in the form of a summary petition and complaint.

On the other hand it was maintained,

1. That as the former trustee represented the creditors, for whose behalf the transaction was made, and the respondent stood in the same situation, Dr. Davidson was entitled to enforce the obligation against him; and as funds had been realized to the full amount of the debt, he was bound to make them forthcoming; and,

2. That as he had claimed as a creditor, and the trustee was at all times amenable to the Court by summary complaint for his conduct, Dr. Davidson was entitled to complain of it in this shape, in order to have him ordained to pay to him the amount of his claim.

The Lord Ordinary found, 'That the petitioner, the landlord, 'sequestrated the effects of his tenant Duncan Weir for the ar-'rears of rent 1820, as also in security for his current rent 1821, 'prior to his sequestration under the Bankrupt Act on 5th July '1821:—that on the application of the landlord, the Sheriff, 'on 28th August, authorized a neutral person to reap and in-'gather the crop, subject to the orders of Court:—that next day 'a proposal is made on behalf of the trustee for the creditors of 'Weir, which was agreed to by the petitioner, that he should de-'sist from all further proceedings before the Sheriff, and allow 'the trustee to manage the crop, on condition that the petitioner's 'right should remain entire, and that his preferable claim should 'be paid from the first proceeds of the estate:—that the peti-'tioner's preferable claim against Weir's estate amounted to £215. '11s. 3d., and that it appears from the roup-roll of the crop and 'stocking, as well as from other sums recovered for the estate, 'that the trustee recovered what was sufficient to have discharged 'the petitioner's debt, but no payment whatever was made to

'him:—that it is stated on the part of the respondent, that the 'sums received by the former trustee were paid away to other 'creditors, by vote of the creditors: Finds, under these circum- 'stances, that the petitioner has a claim against the creditors for 'the amount of the preferable debt due to him, with interest 'from the date the said rent was payable, and that he cannot be 'cut out of this claim by the death of the former trustee, and 'the election of a new one; for his claim was not a personal claim 'against the trustee individually, but lay against the trustee as 'representing the creditors: Therefore decerns against the re- 'spondent, as the trustee on the estate, for the sum of £215. 11s. '8d., with interest as above; but supersedes extract till the first 'sederunt day in November next, that in the mean time the re- 'spondent may call a meeting of the creditors, and lay before 'them this interlocutor, and call upon them to provide funds for 'enabling him to meet the decerniture in favour of the peti- 'tioner.'

Falconer having reclaimed, the Court 'recalled the interlocu- 'tor complained of, and remitted to his Lordship to ascertain the 'amount of the expenses attending the sale of Duncan Weir's 'effects falling under the sequestration before the Sheriff, with 'any other deductions competent to be made from the petitioner's 'claim, and thereupon to do as his Lordship shall see cause.'

The Court were in general of opinion, that as the former trustee represented the creditors, whereby they were bound to pay the claim of Dr. Davidson out of the first free proceeds, and as the present trustee stood in his place, he was bound to implement the obligation, and that the petition was quite competent; but that the Lord Ordinary ought, in the first place, to have ordered the accounts to have been produced, to see whether there were any free proceeds.

M. PATISON,—SCOTT, FINLAY, and BALDERSTON, W. S.—Agents.

R. AITKEN and Others, Pursuers and Defenders.—*Cockburn—Skene.*
TRUSTEES of SHOTTS and AIRDRIE ROAD, Defenders.—*Jardine.*
MAGISTRATES of GLASGOW, Defenders and Pursuers.—*D. of F. Moncreiff—Monteith.*

No. 84.

Road Acts—City.—Road trustees having right to manage, &c. a road from a certain point to 'the city of Glasgow,' held entitled to maintain toll-bars within the bounds of the royalty, if beyond the buildings constituting the actual city.

Dec. 14. 1826.
2D DIVISION.
Ld. Cringletie.
F.

IN this case there were counter actions of declarator to have it determined whether, under certain acts of Parliament which gave the trustees of the Shotts and Airdrie road right to manage the 'road from Livingstone by the kirk of Shotts to the city of Glas-'gow,' they were entitled to place toll-bars within the royalty of the city, though beyond the actual buildings, or whether their powers were limited by the boundary of the royalty.

The Lord Ordinary and the Court, on a consideration of the various road acts, being of opinion that the road was intended to be under the management of the trustees until it reached the buildings constituting the actual city, decerned in the declarators to that effect.

D. and A. THOMSON, W. S.—J. G. HOPKIRK, W. S.—W. DICKSON, W. S.—Agents.

W. GUTHRIE, Pursuer.—*Maitland—A. M'Neill.*
P. M'EACHERN, Defender.—*Cuninghame—Gillies.*

No. 85.

Dec. 14. 1826.
2D DIVISION.
Lord Mackenzie.
F.

Agent and Client.—In an action at the instance of Guthrie, writer in Edinburgh, against M'Eachern, for payment of a business account amounting to £27, alleged to have been incurred by him in travelling to Inverary, and attending a meeting of creditors, on the employment of M'Eachern, the Lord Ordinary decerned against the latter for payment of £10, to which his Lordship modified the account, without remitting it to the auditor. M'Eachern acquiesced in this judgment. Guthrie however reclaimed, and contended that the auditor was the proper officer for modifying agents' accounts sued for, and that the Lord Ordinary was not entitled to do so without remitting to him. But the Court, being satisfied that if Guthrie had been employed at all to do the duty charged, it was not by M'Eachern, and that had the latter reclaimed, he would have been entitled to absolvitor, refused Guthrie's petition.

PARTY,—J. THORBURN,—Agents.

No. 86.

J. LAWSON, Advocator.—*W. Bell.*
J. WARDROP, Respondent.—*Jeffrey—Donald.*

Dec. 15. 1826.
1ST DIVISION.
Lord Meadowbank.
S.

THIS was a question as to whether the advocator was the father of a natural child borne by the respondent. The Justices found circumstances proved sufficient to allow the respondent's oath in suppement, and the Lord Ordinary and the Court adhered.

ANDERSON and WHITEHEAD, W. S.—J. GEMMELL,—Agents.

No. 87.

Mrs. LOCKHART and Others, Pursuers.—*D. of F. Moncreiff—M'Neill.*
Sir C. TROTTER and Others, Trustees of COLIN M'KENZIE, Defenders.—*Sol.-Gen. Hope—Skene.*
W. ROSS and H. ANDERSON, Defenders.—*Forsyth—Maitland.*

Tutor and Pupil—Relief.—Held that a discharge of an heritable bond, granted by persons in the capacity of tutors after their office had expired, was null and void, and that they were bound to relieve the parties to whom the discharge had been granted of all the consequences thereof.

Dec. 15. 1826.
1ST DIVISION.
Lord Medwyn.
H.

THE late Charles Lockhart, Esq. left three daughters, Henrietta, Ann, and Jean,—the two former of whom were twins, and were born in June 1802. On the 2d of June 1808, a gift of tutory dative was issued by the Barons of Exchequer, appointing Walter Ross, Charles Gordon Urquhart, William Anderson, William Henry Anderson, and others, 'tutores dativos et administratores dict. Henriettæ Lockhart, Annæ Lockhart, et Jeannæ Lockhart, duran. toto spatio annisque earum respectivarum pupillaritatum, ullis tribus eorum, in vicecomitatu de Ross residen. lie a quorum existen. pro administratione,' &c. These tutors accordingly entered on the office, and in 1810 they lent £3000, belonging to the pupils, to the late David Urquhart, for which he granted an heritable bond over his estate of Braelangwell, by which he bound himself to pay that sum 'to the said Henrietta Lockhart, Ann Lockhart, and Jean Lockhart, their heirs, &c., or to their said tutors above named and designed, or their quorum,' &c. On this deed infeftment was taken; and thereafter Miss Jean Lockhart having died in pupillarity, her two sisters made up titles to her share of the bond.

Urquhart having died, and his apparent heir having raised an action of ranking and sale of his estate against his creditors, the tutors of Misses Lockhart produced the heritable bond and sasine as their interest; and part of the property having been pur-

chased by Sir Coutts Trotter and others, as trustees of the late Colin M'Kenzie, merchant, London, they were ordained by an interim order of ranking and scheme of division, dated the 15th of June 1815, to pay to the Misses Lockhart, or their tutors, the debt of £3000, with interest. The Misses Lockhart, however, had attained the age of twelve years complete in the month of June preceding. Sir Coutts Trotter and others, the trustees of Mr. M'Kenzie, being ignorant of this, intimated to the agent for the tutors their intention to pay the money. In consequence of this, a discharge, disposition, and assignation in the names of the acting tutors, was executed by two of them, Walter Ross and William Anderson, in that capacity, bearing date the 25th and 30th of August 1815. By that deed they acknowledged receipt of the money, being £3712, discharged the estate of the burden, and granted a clause of warrandice in these terms:—'And we 'hereby bind and oblige the said Henrietta Lockhart and Ann 'Lockhart, their heirs, executors, and successors whatsoever, to 'warrant the foresaid discharge, disposition, and assignation, to 'the extent of the sums now paid to us, against all facts and deeds 'done or to be done by us or them, and their foresaids, in virtue of 'the said heritable bond and infeftment thereon, which are hereby 'completely extinguished for ever.'

In the mean while another part of the estate of Braelangwell had been purchased by Mr. Donald M'Kenzie; and before the money was paid by the trustees of Colin M'Kenzie, an arrangement was entered into with Ross and others, acting as tutors of the Misses Lockhart, by which it was agreed that the money should be lent to Donald M'Kenzie on the security of the lands so purchased by him. The same agents acted for the trustees of Colin M'Kenzie and for Donald M'Kenzie; and the money was paid by them, on receiving the discharge, into the account of Donald M'Kenzie with the British Linen Company, by whom it was applied in extinction pro tanto of a large debt due by him to them. An heritable bond was then granted by Donald M'Kenzie over the lands; but it eventually proved unavailing. The Misses Lockhart, after having married, brought an action of reduction of the discharge, disposition, and assignation granted by Ross and Anderson as their tutors, and concluding that the trustees of Colin M'Kenzie should be ordained to deliver to them the original heritable bond and sasine; and also to have it declared that the 'sums of money therein contained are, and must continue to 'be, a real burden and effectual security affecting the whole lands 'and others contained in the said heritable bond and other writ-'ings, or at least affecting that part of the lands therein con-

'tained, which was acquired by the trustees of the said Colin 'M'Kenzie;' and that they should be ordained to pay to them the principal sum therein contained, and the interest thereof. The trustees of Colin M'Kenzie then brought an action of relief against Messrs. Ross and Anderson, by whom the discharge had been granted, which was conjoined with the reduction and declarator.

In support of their action, the pursuers of the reduction maintained various pleas; but, in particular,

1. That as the deed was subscribed by Messrs. Ross and Anderson in the capacity of tutors, after the pursuers were out of pupillarity, and the office had expired, it was utterly inept and ineffectual; and,

2. That at all events, as it was signed only by two tutors, whereas three constituted a quorum, it was not binding upon them.

To this it was answered by the trustees of Colin M'Kenzie,

1. That in transacting with these tutors, they had acted on the faith that they were entitled to grant the discharge; and as they had done so through the intervention of their accredited agent, whose authority had not been recalled by the pursuers, they were bound by his acts, and those of the party for whose behalf he transacted; and,

2. That a duplicate of the discharge had been granted by three of the tutors.

In regard to the claim of relief against Ross and Anderson, the trustees of Colin M'Kenzie maintained,

1. That as it was their duty to have ascertained that the pupils had attained twelve years of age, and to have known that their office was expired, and as they had received the money from them, they were bound to grant them relief; and,

2. That they were further bound to do so in terms of their obligation of relief.

To this it was answered,

1. That the loss of the money was imputable to the agents of Colin M'Kenzie's trustees, for whom they were responsible, by paying the money into the British Linen Bank without the consent of the tutors, and therefore they ought to seek their relief against these agents, and not against the tutors; and,

2. That as the deed was merely signed by two of the tutors, it was ex facie null and void, and the trustees were therefore not justifiable in paying away the money in the way in which they had done.

The Court, on the report of the Lord Ordinary, reduced the

discharge, decerned in terms of the conclusion of the pursuers' libel, and also in the action of relief at the instance of the trustees of Colin M'Kenzie.

The Judges were unanimously of opinion, in relation to the action of reduction, that as the discharge had been granted by persons acting as tutors after their office had come to an end, it was utterly ineffectual. With regard to the question of relief,

Lord Balgray observed, that the claim was founded on a written obligation that the persons acting as tutors had, in consideration of receiving a sum of money, delivered a discharge, which, independent of any stipulation, they were bound to warrant as good and effectual; and that, as the discharge had been found null and void, these parties must restore the money.

Lord Craigie.—The claim of relief is clear, unless the defenders can make out an exception, by attaching blame to the agents of the parties demanding relief. This, however, has not been made out.

Lord Gillies.—The trustees of Colin M'Kenzie purchased part of the estate over which the heritable bond was granted, and they were ordained to pay the price to those having right to receive it. They accordingly paid it to persons representing themselves as tutors, but who in point of fact were not so. The discharge was therefore good for nothing; and accordingly it has been reduced. The trustees now claim relief from those who so represented themselves as tutors, and granted the discharge; and that right is unquestionable, unless the defenders can make out a case of actual fraud, which however is not alleged.

Lord President.—These parties, acting as tutors, agreed that the money should be lent to Donald M'Kenzie. It was accordingly paid to him; and it is no matter what he or those acting for him did with it. It is sufficient that they granted this discharge, which they are bound to warrant.

Mackenzie and Sharpe, W. S.—W. M'Kenzie, W. S.—Paterson and Law, W. S.—Agents.

J. Sharpe, Pursuer.—*Skene.*
D. M'Gown, Defender.—*D. of F. Moncreiff.*

No. 88.

Dec. 15. 1826.

1st Division.
Lord Eldin.

Process—Reclaiming Note.—A reclaiming note having been presented by M'Gown, merely stating that the interlocutor was submitted to review without any special prayer, the Court at first refused to receive it; but on the Dean of Faculty explaining that, in consequence of the Second Division having in several instances objected to prayers in reclaiming notes, he had struck out the prayer in the present one, their Lordships ordered it to the roll.

The LORD PRESIDENT observed, that the construction which was put on the statute by the Second Division appeared to him not to be correct; and that it was indispensably necessary that there should be a prayer, in order that the Court might see what it was that the party demanded. As, however, there appeared to be a misunderstanding on this subject, the case should be sent to the roll.

T. BAILLIE,—W. HUNT, W. S.—Agents.

No. 89. J. HAMILTON, W. S., Cautioner in Advocation.—*D. of F. Moncreiff—Monteith.*

M'GILP and SHIRRA, Respondents.—*Jameson—A. Wood.*

Process—Decree.—No objection to a decree in an action against a company, that it was pronounced after the sequestration of the company, and the death of the sole partner, without being transferred against the creditors or representatives, notice having been given to the former, who declined to appear.

Dec. 15. 1826.
2D DIVISION.
Lord Robertson.
B.

THIS was a special case, in which the Lord Ordinary had decerned against C. and A. Hamilton and Company, advocators of a process from the Magistrates of Glasgow, for payment of a certain sum. The Court adhered, on a petition by Mr. Hamilton, W. S., the cautioner in the advocation, repelling an objection taken by him to the Lord Ordinary's judgment, that it was null and void in consequence of the previous sequestration of the company, and death of the only partner of it, without the creditors or representatives having been made parties, seeing that due intimation had been given to the trustee and creditors, who resolved not to oppose the action.

PARTY,—D. BROWN, W. S.—Agents.

No. 90. Captain J. REID, Pursuer.—*D. of F. Moncreiff—Marshall.*

J. WALKER, Defender.—*Murray—Buchanan.*

Et è contra.

Submission—Decree-Arbitral.—Circumstances in which it was held,—1.—That a decree-arbitral could not in part be sustained, and in part set aside;—2.—That an ex parte explanation by the arbiter, after pronouncing his award, is ineffectual;—3.—That a reference forming part of an agreement did not fall by the decree pronounced being inept; but,—4.—That the referee chosen may, by his conduct, disqualify himself from again deciding.

Dec. 15. 1826.
2D DIVISION.
Lord Mackenzie.
M'K.

CAPTAIN REID was tenant of the farm of Inverichney under a lease which bound him to pay a rent of £84 and 36 bolls of oatmeal, and provided that he should be entitled, at the end of the lease, to his meliorations on the houses to an extent not ex-

ceeding £150, besides the value of the timber of the roofs, and the machinery of the thrashing and meal mills to be erected by him. Part of this farm Captain Reid subset to Walker in 1819, for the whole period of the principal lease, by missives which stipulated £190 of rent, and communicated to Walker a right to the claim for meliorations at the end of the lease to the extent of one half. Before, however, entering into possession, Walker having complained that the rent was too high, the parties submitted the matter to a person mutually chosen, who fixed the rent at £150 for the first, and £175 for future crops; and ordained Walker, at his entry, to pay to Captain Reid the value of the houses on the farm, at a valuation by men to be mutually chosen. The houses were accordingly valued at £199, which sum Walker paid to Captain Reid. After possessing the farm for two years, he became convinced that the rent was still greatly beyond what he could afford to pay, and he proposed to give up the lease. Captain Reid having consented to this on condition of receiving payment of damages, the parties entered into an agreement to that effect, containing a reference to Mr. Wilson, the landlord's factor, in these terms:—'I the said Captain Reid hereby refer 'the amount of damages sustained by me in consequence of the 'agreement entered into, as before narrated, to the amicable de- 'cision of George Wilson, Esq.; and I the said John Walker 'also agree, and hereby refer the same to his decision.'

Under this reference Captain Reid stated his claim of damages in a memorial under separate heads, and among them was one item for the value of certain houses erected on the farm for the accommodation of his own family, in consequence of Walker obtaining possession of the house and offices already on the farm. The award of the arbiter was as follows:—'In consequence of a 'reference to me by Captain James Reid in Nether Inverichney, 'and Mr. John Walker in Upper Inverichney, regarding certain 'claims made by the former against the latter, as contained in a 'memorial dated the 28th November last, find and decern the 'said John Walker liable in damages to the said Captain James 'Reid to the extent of eighty guineas, payable on the 1st of 'June next: Also find the said John Walker liable to the said 'Captain James Reid for the value of the houses as at his entry 'thereto; allowing him, however, repayment of any sum that he 'may have paid in the name of meliorations. On the other hand, 'find the said Captain James Reid liable to take off the crop of 'wheat presently growing on the possession, at a valuation to be 'put thereon by two men to be mutually chosen, betwixt and 'the middle of June next; and further find the said Captain

'James Reid liable for £19:15:10 sterling, as the value of 'ploughing and break-furrowing performed by the said John 'Walker.'

The parties having differed as to the meaning of this award, particularly as to the second finding, Mr. Wilson, on an application to him by Walker's agent, wrote a letter in answer, stating that his meaning was, 'that John Walker is accountable to Cap-'tain Reid for any deterioration, if any, of the value of the houses 'on the possession since his entry thereto, and this to be ascer-'tained by a new appraisement, which I then recommended to be 'made as soon as possible, John Walker being always entitled to 'repayment of the sum paid by him to Captain Reid, and stated 'by the former at £195, minus pejoration, that might eventually 'be found due, after having the houses valued anew, as recom-'mended by me.' In the mean time, however, Captain Reid had raised the present action, concluding alternatively for damages, on the assumption that the award was not binding, or, in the event of its being held an effectual decree, for payment of the two sums awarded by the first and second findings of the decree; and, on the other hand, Walker raised an action for implement of the award in his favour, as explained by the arbiter's subsequent letter. These actions were conjoined; and, besides certain objections to the form of the decree, Captain Reid contended,

1. That it was null, as not exhausting the matter submitted, viz. the claim of damages at his instance, in so far as it awarded no damages in regard to the houses which he had been obliged to erect to accommodate his family, in consequence of the lease to Walker, and had not fixed the exact amount to be paid by Walker in respect of the houses mentioned in the second finding; and also in so far as the value of the crop of wheat to form a deduction from the damages was left to be determined by a future appointment of arbiters;—and,

2. That at all events the ex parte explanation by the arbiter, after pronouncing his award, was totally ineffectual.

To this it was answered,

1. That the first finding in the award completely exhausted the claim of damages at the instance of Captain Reid, which was the sole object of the reference, and must be held to have included every separate claim which he could demand in nomine damni; and that the remaining points decided by the arbiter were beyond the limits of the submission, as being either claims on the part of Walker, or claims properly of debt, and not of damage, on the part of Reid, as was that determined in the second finding as to the houses; and consequently that the first finding of damages,

which was intra fines compromissi, and exhausted the only subject of it, could not be rendered ineffectual by the subsequent part of the award, which was ultra vires of the arbiter; and,

2. That the explanation by the arbiter had been obtained at the desire of both parties; (but of this averment there was no evidence.)

The Lord Ordinary found, 'That the decree-arbitral libelled 'is void, except in so far as it fixes the amount of damages due 'by John Walker to Captain Reid at eighty guineas; to which 'extent it appears to the Lord Ordinary that no valid objection 'has been stated against the same.'

Against this interlocutor Captain Reid presented a petition, praying to be allowed a proof of his damage at large, either by commission, or by a remit to the Jury Court; but, on hearing the opinions of the Court at advising, he consented to name new referees, to whom the cause might be remitted.

The Court recalled the interlocutor of the Lord Ordinary, 'in 'respect the award cannot be in part sustained and in part reject-'ed; and both parties now declaring their willingness to name 'referees for carrying into effect the agreement and reference be-'tween them, remitted to the Lord Ordinary to proceed accord-'ingly;' and to this judgment their Lordships adhered, on a reclaiming petition by Walker, 'in respect the interlocutor only 'applies to the award in this case.'

LORD GLENLEE.—I have considerable doubts of the possibility of separating this decree into parts, sustaining the one and reducing the other. I can conceive, where the matters are not mixed, that decrees-arbitral may be set aside so far as ultra vires, and supported so far as intra vires; but that will not apply here. Surely the state of the houses was a principal article of damage, and the decree as to them is necessarily mixed with the other matters; and if the decree, so far as intra vires, is indirectly influenced by that on the matter ultra vires, it must be set aside altogether.

LORD PITMILLY.—I agree so far with the opinion delivered; but I think all the points may still be decided by the arbiter. He has only fixed one part of the damages, and that is right enough. As to the houses, we cannot take the explanation into view, which is, besides, contradictory of the award. In regard to the two other articles, they were properly deductions from the damages, and within the arbiter's powers;—he is only wrong in leaving the valuation of the wheat to others, and not deciding it himself. This is not properly a submission, but an agreement; and I rather think that it is still before the arbiter.

LORD ALLOWAY.—If this were an ordinary submission, I would have no difficulty in setting it altogether aside; but it is part of an agree-

ment—a reference to ascertain the conditions for accepting the surrender of a lease; and as part of the agreement, I have great difficulty in getting quit of it. To a certain extent, so far as regards the 80 guineas, the arbiter has gone quite right; but, as to the rest, his award is quite inexplicable; and I rather think that it should go back to the arbiter to settle these; only I entertain doubts of sending it to the same arbiter, on the ground of his having given an explanation of his decree on the partial application of one party.

Lord Justice-Clerk. — This decree cannot, I think, be split into parts. The fair meaning of the submission is, what was to be paid by the one party to the other; and in determining the damages, the obligations in the lease must be taken into view. Nor do I think that the arbiter went beyond his powers in considering how far the houses were deteriorated, or what was due in respect of the wheat crop; and his only error was in not valuing it himself, but leaving it to be done by a new appointment. The decree, therefore, does not exhaust the submission; and although we do not mean to lay down a general rule that a decree-arbitral cannot stand in part and be reduced in part, yet this decree is in that situation. The agreement, however, may still be followed out, although I concur with Lord Alloway that we cannot remit to the same person; but as the parties are now willing to name new referees, the cause may be sent back to the Lord Ordinary, to have that course of procedure followed out.

Pursuer's Authorities.—Lord Kilkerran in Lovat *v.* Fraser, June 22. 1738, (625); Steele, June 22. 1809, (F. C.); Woodrop, Feb. 4. 1794, (628); Lindsay, July 16. 1794, (Bell's Cases); Heggie, Feb. 1. 1825, (ante, Vol. III. No. 342); Gleanie, Feb. 24. 1825, (ante, Vol. III. No. 388.)

Defender's Authorities.—Earl of Selkirk, Jan. 17. 1776, (627); Kyd, June 19. 1810, (F. C.); Johnstone *v.* Cheape, as reversed in H. of L. July 10. 1817.

Macmillan and Grant,—J. J. Fraser, W. S.—Agents.

ACT OF SEDERUNT

Regulating the Business of the Outer House.

Dec. 15. 1826. By this Act the Court, 'taking into consideration the several 'Acts of Sederunt and Regulations of Court for conducting the 'business of the Outer House by five Permanent Lords Ordi- 'nary, and that the time has now arrived when, under the pro- 'visions of the said Act of Parliament, (6th Geo. IV. c. 120,) the 'duty is to be performed by seven Permanent Lords Ordinary,

'do hereby in so far repeal, vary, and alter the said Acts of 'Sederunt and Regulations, and in virtue of the powers conferred 'by the said Statute, section 50, enact and declare,'—

Regulations as to the six senior Lds. Ordinary.

I. That each of the senior six Permanent Lords Ordinary shall in his turn officiate as Ordinary for the Outer House, and upon oaths and witnesses; a Permanent Lord Ordinary of the one Division being always succeeded as Ordinary in the Outer House, and upon oaths and witnesses by a Permanent Lord Ordinary of the other Division alternately: But with power also to any of the other Permanent Lords Ordinary, when in the Outer House, to take the oaths of witnesses and parties.—Section 2. of A. S.—(See infra, § IV.)

Three senior Lds. Ordinary.

II. (1.) That three of the said six Permanent Lords Ordinary shall call their respective rolls upon Tuesday and Wednesday, beginning at nine o'clock in the morning, viz. the senior Permanent Lord Ordinary of the Second Division, senior Permanent Lord Ordinary of the First Division, and second senior Permanent Lord Ordinary of the Second Division for the time.—Section 3. A. S.

(2.) That each of these three senior Permanent Lords Ordinary shall, when Lord Ordinary for the Outer House, call the regulation roll upon Tuesday; and the roll of suspensions and advocations upon Wednesday, after which the ordinary action roll.—Section 4. A. S.

(3.) That in each of the other five succeeding weeks the said three senior Permanent Lords Ordinary shall call their respective hand rolls upon Tuesday and Wednesday.—Section 5. A. S.

Three other and next junior Lds. Ordinary.

III. That the remaining three of the said six Permanent Lords Ordinary for the time shall in like manner call their respective rolls upon Thursday and Friday, beginning at nine o'clock in the morning.—Section 3. A. S.

That each of these three Permanent Lords Ordinary shall, when officiating as Lord Ordinary for the Outer House, call the regulation roll upon Thursday; and the suspension and advocation roll, and ordinary action roll, upon Friday.—Section 4. A. S.

That in each of the five succeeding weeks these Lords Ordinary shall call their respective hand rolls upon Thursday and Friday.—Section 5. A. S.

Hand Rolls and continued Causes of the six senior Lds. Ordinary.

IV. (1.) That each of the said six Permanent Lords Ordinary shall, when Lord Ordinary for the Outer House, call a hand roll, (if time permit,) after disposing of the Outer House rolls, on either of the said respective days set apart for his calling the rolls of regulations, suspensions, and advocations, and ordinary actions; and upon Saturday shall call the continued causes of that week's rolls, if any, and also a hand roll, beginning at nine o'clock in the morning.—Section 4. A. S.

(2.) That each of these six Permanent Lords Ordinary shall in his turn call a hand roll, at nine o'clock, upon the Saturday of the week im-

mediately preceding that in which he is to officiate as Lord Ordinary in the Outer House.—Section 5. A. S.

Seventh or junior Lord Ordinary.

V. (1.) That the junior Permanent Lord Ordinary shall discharge the duty of Ordinary for teinds, reductions, and special remits, upon Wednesday, Friday, and Saturday of each week.—Section 1. A. S.

(2.) That Wednesday shall be allotted to First Division causes. That at nine o'clock in the morning he shall call a roll of reductions belonging to the First Division, and, after disposing of these reductions, he shall call a hand roll also of First Division causes.—Section 1. A. S.

(3.) That Friday shall be allotted to Second Division causes. That he shall call a roll of reductions at nine in the morning, and a hand roll of Second Division causes after disposing of the reductions.—Section 1. A. S.

(4.) That on Saturday, at nine in the morning, he shall call his roll of teind causes. That this roll shall be taken up by the teind clerk on the Wednesday preceding, so as to be printed not later than the following day; and that, after having disposed of his teind causes, his Lordship shall have power to call a hand roll of continued Court of Session causes. —Section 1. A. S.

Bars.

VI. (1.) That upon Tuesday, till one o'clock, one of the Bars shall be at the disposal of the Court for the use of either of the four junior Permanent Lords Ordinary who may apply for the same; and on Saturday one of the Bars shall in like manner be at the disposal of the Court, for the use of any of the three senior Permanent Lords Ordinary who may apply for it.—Section 6. A. S.

(2.) That the Bar in the south-west room off the Outer House shall be exclusively allotted, upon Tuesday at one, Thursday at ten, and Friday at one o'clock, to the Judges of the Jury Court; and to Lord Glenlee upon Thursday morning.—Section 6. A. S.

Boxing Defences, &c.

VII. That for the greater regularity and more expeditious boxing of defences, the agent for the defender, respondent, or charger, shall, along with the printed process copy defences, and also printed copy answers to reasons of advocation or of suspension, lodge in the Clerk's hands one other printed copy, in order to its being boxed for the use of the Lord Ordinary; which copy shall be delivered by the Clerk to the agent for the pursuer, advocator, or suspender, when he borrows the process to enrol, without any additional fee; and it shall be incumbent on the pursuer's agent to take care that the said copy be duly boxed before enrolment, along with the printed copy summons, advocation, or suspension, or reasons thereof; which boxing the Lords' clerks officiating at the boxes for the time shall certify, in the usual manner, upon the back of the process copy of the summons, advocation, or suspension; and the Clerks of Court are hereby prohibited to receive the process copy defences or answers, unless accompanied with said boxing copy for the use of the Lord Ordinary.

J. M'LAUCHLAN, Petitioner.—*Cockburn—Marshall.*
W. CARSON, Respondent.—*Sol.-Gen. Hope.*

No. 91.

Administration of Justice.—Held to be an interference with the administration of justice to publish a report of a statement made at a public meeting of road trustees by their agent, relative to a case depending in Court against them.

Dec. 16. 1826.
1st DIVISION.
S.

ON the 22d of May 1826, M'Lauchlan raised an action of damages against the road trustees of the county of Wigton, in which he alleged that in consequence of their having formed a new road intersecting an old one which they had neglected to shut up, he was overturned, while travelling along it during the night with his gig and horse, by means of a ditch which they had cut cut across it, whereby he had suffered a severe injury, and therefore that they were liable to him in damages. The case was, on the 4th of July, remitted to the Jury Court, and the trustees gave in defences, stating that the old road had been shut up; that M'Lauchlan was aware of this; but that, being desirous to outstrip the mail-coach, and being somewhat intoxicated, he had driven his horse and gig with great impetuosity, and, instead of proceeding by the new straight road, he had turned off and entered the old road, which had for some time previous become the property of the Earl of Stair; and therefore, if any accident took place, his Lordship, and not the trustees, was liable; but that M'Lauchlan had no claim against any one, as the alleged injury arose from his own impetuous conduct. These allegations being denied by him, the Jury Court ordered the case to be prepared in the usual form, by condescendence and answers.

While the case was in this state, a paragraph appeared in the Dumfries Weekly Journal, and Nithsdale, Annandale, and Galloway Advertiser, of 17th October 1826, (of which Carson was the editor,) under the head Wigton, in which, after giving the local news of that town, and mentioning that a meeting of the freeholders had been held, at which certain matters had been discussed, and that this was followed by a meeting of the road trustees, at which their law-agent gave the meeting some information on a case in which they were interested, proceeded as follows:—

'There was also another case. One M'Lauchlan, a tea-merchant of 'Glasgow, having been at Stranraer on business, in endeavouring to out-'strip the mail had taken the wrong road, and actually leaped his horse 'and gig over a ditch three feet wide, and carried it over the bank, where 'he was upset, though without any particular injury to himself, horse, 'or gig, excepting that the country people cut away the harness to ex-

'tricate him. He at first demanded ten pounds of damages, and it was 'intended to pay this sum, rather than enter into an expensive litigation; 'but M'Lauchlan became impatient, and raised an action against Mr. 'M'Haffie, the clerk to the meeting, increasing his demands from ten to 'one hundred pounds. Mr. Hathorn stated that he had given in defences, 'and had learned much in favour of the road trustees since he came into 'the county. The line of road given up was upon Lord Stair's property. 'The road trustees had returned it to him, and he had instantly taken 'possession by sinking a ditch, and putting a strong paling completely 'across it. If, therefore, at the end of nine months it was broken down 'or carried away, the road trustees were not to blame. It was against 'Lord Stair he ought to have raised his action. It could be proved that 'he had seen and was aware of the state of this road in the course of the 'day, and would not believe the next morning but that he had been on 'the right road, until he was taken out to see it. It could also be proved 'that he never employed a medical man, and was not materially hurt. 'It was agreed that another attempt at a compromise should be made, 'and if unsuccessful, that the case should be defended, and Lord Stair 'conjoined in the process, as the party in possession at the time.'

M'Lauchlan then presented a petition and complaint to the Court of Session, complaining of this paragraph as being calculated to interfere with the administration of justice; and prayed the Court 'to inflict on the said William Carson a punishment 'adequate to the foresaid offence of which he has been guilty, 'and to find him liable in expenses.'

In support of this complaint he stated, That as the parties in the depending action were at issue on the facts, the case must necessarily be tried by a jury at Ayr; and that as the jurors and witnesses would consist of persons residing in the counties of Wigton and Ayr, in which the newspaper had its chief circulation, and as the paragraph contained an ex parte statement of the case, it had a direct tendency to create an improper impression and prejudice on their minds.

To this it was answered, That the respondent had received the communication from his regular correspondent at Wigton, and that as it was the report of what had taken place at a public meeting and formed part of the local news of that district, he had inserted it in his newspaper, but that, in doing so, he had no intention whatsoever to interfere with the administration of justice, or to raise up any prejudice against the case of the complainer; that he had expressed his willingness to insert any counter statement which the complainer might think requisite, and had since kept his readers on their guard against being influenced one way or another by the contents of the paragraph. At the same time he

expressed contrition if he had done any thing irregular, and was still willing to do what should be thought fit to make amends, if any injury had been suffered.

The Court sustained the complaint, but, considering the nature of the respondent's answer, and that he had expressed contrition, did not inflict any fine; and the complainer having limited his demand to expenses, the Court pronounced judgment accordingly.*

LORD PRESIDENT.—Reports of depending cases are at all times very dangerous, and tend to interfere with the administration of justice. It may be perfectly lawful to state that an interesting point of law has arisen, and is depending in Court; but it is extremely improper to enter upon a history of the facts of a case. This ought not to be done until it is decided. In particular, this is the more requisite since the institution of Jury Trial, and in regard to cases depending in that Court. I observe that in England full reports are given, even where a judicial inquiry is merely making, as in Coroners' Inquests, which cannot fail to be prejudicial to the parties on the trial of the case; and the editors of newspapers appear to insist that they have the right to do so.

The other Judges did not express any opinion, but did not dissent from that which was delivered.

Petitioner's Authority.—Henderson, Dec. 10. 1824, (ante, Vol. III. No. 278.)

R. MATTHEW,—J. PHILLIPS,—Agents.

R. TULLIS, Pursuer.—*Mackgill.*
G. HOUY, Defender.—*Jeffrey—Napier.*

No. 92.

Dec. 16. 1826.

1ST DIVISION. Lord Meadowbank. S.

IN an action at Tullis' instance against Houy, founding on a decree-arbitral awarding a certain sum to be paid by Houy, he pleaded, as a preliminary defence, that there was a submission depending, under which the subject-matter of this action was included; but the Lord Ordinary and the Court, being satisfied that this was not the fact, repelled the defence.

A. MONYPENNY, W. S.—G. and W. NAPIER, W. S.—Agents.

* The question was not raised by the respondent, whether the complaint was competent in the Court of Session in relation to a case depending before the Jury Court, and properly belonging to its jurisdiction.

No. 93. J. MORRISON, Complainer.—*Sol.-Gen. Hope—Keay—T. A. Duff.*
J. RAMSAY, Respondent.—*D. of F. Moncreiff—Cockburn.*

Freehold Qualification — Sasine — Notary's Docquet.—Held,—1.—That it is not a sufficient objection to an instrument of sasine written upon the face of a single page, that the notary's docquet bore it to be written 'super hanc et duas precedentes paginas;'—and,—2.—That an objection may be pleaded in Court, though not recorded in the Freeholders' minutes.

Dec. 16. 1826.
2D DIVISION.
M'K.

AT the election meeting of the Freeholders of the county of Banff held in June last, Ramsay presented a claim for enrolment, to which it was objected that the notary's docquet to the instrument of sasine founded on, stated it to be written 'super 'hanc et duas precedentes paginas,' while in fact it was written on the face of a single page; but the objection inserted in the minutes was merely the general one, that the claim 'is not sup-'ported by the titles produced.' The Freeholders having repelled the objection, and admitted Ramsay to the roll, Morrison presented a petition and complaint, founded on the objection above mentioned, which was remitted to the Lord Ordinary, and by his Lordship reported on Cases.

The pleas in law maintained by the complainer were as follows:

'1. The docquet of an instrument of sasine must be consistent, 'intelligible, and, above all, it must contain no statement which 'is untrue. In all matters which are descriptive of the instru-'ment, it affords the means of identification; and consequently, 'if it states what is ex facie untrue, as applied to that instrument, 'it may fairly be presumed that it was intended to be annexed to 'a different instrument.'

'2. When a sasine is recorded, the whole docquet must be re-'corded; and when the principal is produced, it must correspond 'with the description given of it in the recorded docquet.'

Those maintained by the respondent were,

'1. It is incompetent for a party to state an objection to a claim 'in this Court, as a Court of Review over the Court of Free-'holders, which was not first stated to the Freeholders themselves.

'2. When an instrument of sasine is written on the face of one 'sheet of paper, it is not a fatal objection to it that the notary 'happens to say in his docquet that it was written upon this and 'the two preceding pages.'

The Court, while they disregarded the first of the respondent's pleas, unanimously dismissed the complaint with expenses, on the ground that the statement of the notary as to the pages was a blunder in what was not in itself essential, but a matter of mere surplusage.

Complainer's Authorities. — A. S. Jan. 17. 1756; Stewart, July 18. 1761, (8623), affirmed in H. of L.; M'Queen, Jan. 23. 1824, (ante, Vol. II. No. 607); Dennistoun, Nov. 16. 1824, (ante, Vol. III. No. 207); M'Intosh, Nov. 17. 1825, (ante, Vol. III. No. 163.)

Respondent's Authorities.—Livingston, Mar. 3. 1762, (15418); Henderson, Mar. 6. 1776, (Ap. M. P. 2.); Dickson, Feb. 24. 1801, (Ap. Tailzie, 7.); Douglas *v.* Chalmers, (Tait's Coll. *v.* Sasine); Kirkham, May 21. 1822, (ante, Vol. I. No. 480); Robertson, Jan. 7. 1742, (16955); M'Donald, Feb. 14. 1778, (16956.)

JOHN GORDON, W. S.—CARNEGY and SHEPHERD, W. S.—Agents.

G. YOUNG, Suspender.—*Jameson.* No. 94.
G. PATON, Charger.—*Cuninghame.*

Process*— *Bill-Chamber*— *Reference to Oath. —Held incompetent, after a bill has been simpliciter and finally refused without any reservation, to refer the matter to the charger's oath.

Dec. 16. 1826.

2D DIVISION. Bill-Chamber. Lord Medwyn. B.

YOUNG having been charged by Paton on a bill of exchange, of which he was acceptor, presented a bill of suspension, (not containing in it any reference to oath,) which was refused by the Lord Ordinary. He then reclaimed to the Court; but their Lordships, on the 24th of November, adhered to the Lord Ordinary's interlocutor. At the time of pronouncing this judgment, no offer of reference to oath was made by Young; nor was there any reservation to that effect inserted in the interlocutor, which was a simple judgment of adherence, with a remit to the Lord Ordinary to find additional expenses due; but on the 30th he presented a minute of reference, which the Court remitted to the Lord Ordinary, 'to do therein as he shall see proper.' His Lordship, 'in respect that the interlocutor refusing the bill was 'simpliciter adhered to by the Court on the 24th ultimo, and no 'other remit made to the Lord Ordinary but to find additional 'expenses due, and that this minute was presented to the Court 'only on the 30th,' refused it 'as incompetent;' and the Court unanimously adhered.

The Lord Ordinary observed in a note:—

> This minute was not given in by permission of the Court; and the interlocutor remitting it to the Lord Ordinary has not sustained the reference, and remitted to take the deposition of the charger; but the remit is, 'to do therein as he shall see proper;' and his reason for considering it incompetent he shall now explain. The party has probably been led to suppose that such a minute, at this stage of the proceeding, is competent, because, in a process in the Court of Session, it is competent, any time before extract, to refer the cause of action to the oath of the opposite party, although in other respects the cause has been finally decided according to the forms of the Court. Till a

process is extracted, it is still in Court; and, while in Court, a reference to oath is competent. But when a bill has been refused in the Bill-Chamber, there is not, and has not been, any process in Court. The duty of that Court is to say whether the complainer has probable grounds for getting his cause into Court; and it only becomes a process after the bill has been passed, and when the expede letters have been called as a summons. It is competent, no doubt, for the suspender to refer his reasons of suspension to the oath of the charger where they are denied, and he cannot give them such a degree of probability as to enable him to obtain a suspension of the diligence of the Court, without resorting to that mode of proof. But the reference to oath must be contained in the bill itself, or in the petition or note which brings the refusal of the bill under review. This is the obvious interpretation of the act of sederunt, 29th February 1688, of the act 20th November 1711, sect. 2, in which last such a reference is mentioned as one of the reasons of suspension; and the last act on this point, 6th December 1718, implies the same;—being the proof of a reason of suspension, it must be contained in the only written pleadings which the practice of the Bill-Chamber authorizes the party to use for stating his reasons, and showing their truth, or at least their probability. Nor is there any hardship in tying him down to make this reference, at least with the last opportunity there is of getting the bill passed on the original grounds; while there would be great hardship in hanging up the discussion, by allowing a reference to be made at a future time. The only relaxation on this point which has been introduced is, that the Court may admit a reference made at the Bar, at advising a petition or reclaiming note against an interlocutor refusing a bill. As it was competent to have made the reference in the bill, so was it also in the petition; and it may yet be made before the petition is refused, and the bill thus stand finally refused. But when, without any such reference, the interlocutor refusing the bill is adhered to, the question as to passing is no longer entertained. This has been finally disposed of, and nothing remains but for the Lord Ordinary to decern for the expenses formerly found due by him; and if additional expenses are allowed by the Court, there must be a special remit as to these. But the provisions of the act of sederunt 19th December 1778, as to expenses, show that although it may not be competent immediately to get decree for expenses, this does not hinder the party proceeding with his diligence on the bill being refused, as if the bill was still in the Bill-Chamber, as to the subject-matter of the suspension, till the decerniture for the expenses, as modified, is extracted. After the note in this case was refused on 24th November, and the remit made to the Ordinary as to the additional expenses, there was no proceeding in the Inner House in which the minute of reference could be given in; and it would have been equally incompetent to have presented the minute to the Ordinary

on the Bills, who was functus, except as to giving decree for the expenses. Since the Lord Ordinary has been conversant with the practice of the Bill-Chamber, he never saw a reference to oath at this stage of the proceedings; and, on inquiry, he understands that it is entirely a novelty in the practice of the Bill-Chamber; so that, being contrary to principle, he has felt no hesitation in refusing to sustain it. In doing so, however, he has thought it his duty to state his reasons fully.

In this opinion the Judges concurred.

J. GEMMELL,—W. PATRICK, W. S.—Agents.

No. 95.

Duke of ATHOLL and Others, Suspenders.—*Keay.*
H. SCRYMGEOUR WEDDERBURN and Others, Respondents.—*D. of F. Moncreiff—Jardine—Ivory—Tawse.*

Salmon Fishing.—Bill of suspension passed, and interdict granted, as to fishing 'by any other mode than the ordinary way of net and coble.'

Dec. 16. 1826.

2D DIVISION. Bill-Chamber. Lord Alloway.

THIS was a bill of suspension and interdict at the instance of the Duke of Atholl and others, proprietors of the Tay fishings, to have Wedderburn and others interdicted from fishing salmon by means of certain descriptions of nets called toot nets, stage and tent nets, alleged to be of the nature of stake nets and similar machinery, which had been found illegal in the former cases regarding the Tay fishings. On the other hand it was averred, that the only modes of fishing practised by the respondents came truly under the description of net and coble fishing, and that they had been long in use to fish by these methods; nor was there any very precise allegation on the part of the suspenders as to their being of recent adoption, in a minute which they were allowed to give in on that point.

In these circumstances, while the Court, on the report of the Lord Ordinary, passed the bill, their Lordships merely granted an interdict in general terms against fishing 'by any other mode 'of fishing than the ordinary way of net and coble,'—being the terms used in an interlocutor of the Court in 1820 regarding these fishings.

J. THOMSON, W. S.—J. and A. SMITH, W. S.—J. HERIOT, W. S.—J. YULE, W. S.—W. MARTIN,—Agents.

No. 96. Sir C. HALKET, Pursuer.—*D. of F. Moncreiff—Cuninghame.*
Earl of ELGIN, Defender.—*Sol.-Gen. Hope—Bell—Robertson.*

Coal—Mutual Contract—Submission.—Circumstances in which a party holding in lease two fields of coal at some distance from each other, together with a right to the use of a level belonging to the lessor for the purpose of working these fields, found liable to pay the lessor a consideration for the benefit derived by him, in consequence of carrying the level through certain intermediate fields of his own, in order to make the communication to the upper coal-field let to him by his lease;—and,—2.—A submission, forming part of an agreement, held not to fall by an omission to prorogate within the year.

Dec. 16. 1826.

2D DIVISION. Lord Mackenzie. B.

SIR CHARLES HALKET is proprietor of the lands and coal of Pitfirrane, and of the coal-fields of Balmulh in the county of Fife. Pitfirrane is situated near the Forth, and to the north of it lie the lands of Urquhart, between which and the lands of Balmulh, which are situated furthest north, lie the lands of Clune, &c., belonging to Lord Elgin. The coal in all these properties is of considerable value; but, from the lower situation of Pitfirrane, Sir Charles Halket possesses a level much deeper than any in the other coal-fields. This level Sir Charles' father agreed to communicate to the lands of Urquhart, in consequence of his obtaining a lease of the coal of these lands; and it was provided, that on the communication of the benefit of the level to any third party, the proprietor of Pitfirrane should be entitled to two thirds, and the proprietor of Urquhart to one third of the consideration obtained therefor.

In 1809 an agreement was entered into between Lord Elgin and Sir Charles, which was carried into effect by a lease executed in 1815, whereby Sir Charles, in consideration of a grassum and a yearly rent or lordship, let to Lord Elgin, for 999 years, his coal in the lands of Pitfirrane and Balmulh, with an exclusive right 'to the levels necessary for working the said coals, so far as 'in his lands, or belonging to him.' Under this agreement and lease Lord Elgin entered into possession of the coal of Pitfirrane and Balmulh, and proceeded to carry forward the Pitfirrane level from its termination in the lands of Urquhart towards Balmulh, through his own coal-fields of Clune, &c., lying between Urquhart and Balmulh. This led to another agreement between the parties, whereby Sir Charles ratified and homologated the communication of the level so made by Lord Elgin 'from the said coal in 'the lands of Urquhart to his own coal-fields to the north thereof;' and, on the other hand, Lord Elgin bound himself to pay to Sir Charles, 'in name of compensation for the communication of the 'said level to the coal-fields of the said Earl, lying to the north

'of the said lands of Pitfirrane and Urquhart,' such sum as should be awarded by two persons specified in the deed as arbiters for that purpose; it being declared that Sir Charles should be accountable to the proprietor of Urquhart for one third of the price so to be awarded, as due to him in terms of the lease between Sir Charles and his predecessor.

The arbiters appointed by the above-mentioned agreement proceeded to execute the reference; but having omitted in one of the years to prorogate the submission, Lord Elgin declined to proceed further with it, whereupon Sir Charles raised the present action, to have it declared that Lord Elgin had no right, under the lease 1815, to use the Pitfirrane level, except for working the coal thereby let, and that his Lordship's right 'to communicate 'the said level to his fields of coal lying to the north of the lands 'of Pitfirrane and Urquhart is constituted solely by the before-'recited agreement' of 1818; 'and the same being found and de-'clared,' that Lord Elgin should be decerned to pay such sum as should be determined to be the true value of such communication.

In defence against this action, it was pleaded by Lord Elgin, That as the lease 1815 gave him a right to the use of the Pitfirrane level for the coal of Balmulh let to him by that lease, and as he could not communicate the level to that coal without carrying it through his own coal lying between Urquhart and Balmulh, that he was consequently entitled under the lease so to carry forward the level, without paying any consideration for the use his own coal necessarily derived by an operation he was thus entitled to execute.

To this it was answered, That by the contract 1818 Lord Elgin had expressly agreed to pay a consideration for the use of the level for his own coal; and although the amount had not been fixed in the way pointed out in the agreement, his Lordship could not thereby be freed from the obligation itself.

The Lord Ordinary having dismissed the action, Sir Charles Halket reclaimed. The Court recalled his Lordship's interlocutor, and found 'that the pursuer Sir Charles Halket has right 'to a compensation from the defender for the use of the Pitfir-'rane level for any coal not contained in the agreement and tack 'between the parties; but that the defender is not liable to the 'pursuer in any compensation for the communication of the said 'Pitfirrane level to the coal-field of Balmulh.' With these findings, their Lordships remitted the cause to the Lord Ordinary, 'with instructions to remit, before answer, to the persons named 'in the agreement of 1818, to ascertain and report to his Lord-

'ship the true worth and value of the communication of the Pit-'firrane and Urquhart level to any coal-fields belonging to or 'leased by the defender, not contained in the said tack by the 'pursuer to the defender.'

Their Lordships were agreed, that if the level could be taken up to Balmulh, without passing through any coal of Lord Elgin's, his Lordship would be entitled, under the lease 1815, so to carry it up, without payment of any consideration to Sir Charles Halket; but that, on the other hand, if he communicated the use of it to his own coal, he was bound, under the agreement of 1818, to make a remuneration therefor; and they thought that the reference forming part of the agreement did not fall by the omission to prorogate it, but might still afford the means of ascertaining the amount to be paid.

W. H. SANDS, W. S.—J. A. CHEYNE, W. S.—Agents.

No. 97.

J. NICOL, Suspender.—*D. of F. Moncreiff—Pyper.*
R. CRICHTON, Charger.—*Forsyth—Sandford.*

Principal and Agent — Consignment. — Circumstances in which it was held, that the master of a ship who had undertaken a consignment of goods to be disposed of at his foreign port, and who, being unable to get them sold during his stay, had transferred them to a merchant there, with whom the consignee afterwards corresponded without objection, and by whom the goods were sold, was still liable to account for the proceeds.

Dec. 16. 1826.

2D DIVISION. Lord Mackenzie. B.

IN 1820, Scott, a merchant in Port-Glasgow, delivered to Nicol, the master of a ship generally trading from that port to the West Indies, two casks of tinware, on receiving which, Nicol granted the following missive:—'I acknowledge to have received 'two casks of tinware from William Scott, amounting, as per in-'voice, to £73: 19: 8 sterling, and will be accountable to him 'for the proceeds, on condition that he pay freight at the rate of '22s. 6d. per cask, and my commission,' the amount of which, however, was not specified. Nicol accordingly conveyed the goods to St. Thomas; but finding that he could not dispose of them advantageously before leaving the island on his voyage home, he intrusted them to Miller, a merchant there, not denied to have been a person of respectability, and of good credit at the time. Nicol returned to Port-Glasgow in 1821, and stated to Scott and the charger Crichton, (to whom Scott had in the mean time indorsed Nicol's acknowledgment,) that he had left the goods with Miller; and they made no objection to his conduct. His vessel was again chartered for a voyage to St. Thomas in the beginning of 1822; and he, at Crichton's request, subscribed a letter

to Miller, written out by Crichton's directions, in these terms:—'The two casks tinware I left with you in February 1821, 'amounting, as per invoice left along with them, to £73: 19: 3, 'if they are sold, you will please remit, per first packet, the amount 'and account of sales to Mr. Robert Crichton here; and if they 'are not sold, he will instruct you as to the disposal of them, and 'his instructions or receipts for the casks will be binding on me.' To this letter Crichton added the following lines:—'On receipt 'of this, if the above two casks tinware are unsold, Captain Nicol 'will instruct you as to the disposal of them; and if they are sold, 'I would be obliged by your remitting for them at best exchange 'per first packet; and the second bill, with an attested account of 'sales, may be sent per first vessel for Clyde.' This letter was addressed by Crichton, 'Mr. William Miller, merchant, St. Thomas, 'favoured per Thetis, Captain John Nicol,' and was delivered by him to Nicol. A few days afterwards, and immediately before Nicol sailed, Crichton addressed a letter to him, dated 12th February, stating, 'If the casks are not sold on your arrival at St. Thomas, 'you will please to dispose of them to the best advantage for 'cash, either by vendue or otherwise, and remit to me the pro-'ceeds, with an attested account of sales. If they have been sold 'before your arrival, and the amount not remitted, I would be 'obliged by your getting it sent as soon as possible.' On his arrival at St. Thomas, Nicol delivered Crichton's letter to Miller, but he found that the goods had been sold by him; and in answer to the letter delivered to him by Nicol, Miller, of date 20th April 1822, wrote to Crichton as follows:—'I received your letter by 'Captain Nicol, regarding the casks of tinware left in my pos-'session by that gentleman. The foregoing is sales of the same, 'and when the proceeds are realized, they shall be remitted agree-'able to your instructions.' This account of sales did not mention to whom the articles had been sold, and it deducted from the amount five per cent. as commission. After the lapse of about a year, the proceeds not having been remitted, Crichton wrote to Miller complaining of this, and also of the deficiency of the account of sales, in so far as it did not mention the persons to whom the goods were sold, or at what credit; but at the same time requesting him to 'say if you think the articles noted' (in an accompanying list) 'might find a ready market in your quarter 'to sell for cash.' Miller, however, having died without remitting the proceeds, Crichton raised an action before the Court of Admiralty against Nicol for payment of the amount contained in the account-sales transmitted by Miller, under deduction of the five per cent. commission therein charged. Decree in absence

having passed against Nicol, he brought a suspension, on the grounds,

1. That, under a commission of five per cent., the master of a vessel taking a consignment to be disposed of by him at his foreign port did not incur a del credere responsibility; and consequently that he had done all that was incumbent on him by intrusting the goods to a respectable merchant of good credit when he was obliged to leave the place with his vessel, and intimating this to the consigner; and,

2. That Crichton had acquiesced in the transference of the obligation from him to Miller.

To this it was answered,

1. That five per cent. was, in point of fact, a del credere commission; and besides, that Nicol having given an express acknowledgment for the goods, with an obligation to account for the proceeds, and having, subsequently to the transaction with Miller, accepted a letter from Crichton, again instructing him to dispose of the goods and remit the proceeds, he was not freed from his obligation by having delivered them over to Miller; and,

2. That the conduct of Crichton did not amount to a consent to relieve Nicol of responsibility, and accept Miller in his stead.

The Court having adhered to an interlocutor of the Lord Ordinary finding the letters orderly proceeded, with expenses, Nicol presented a reclaiming petition, and offered to prove that a shipmaster was never held to undertake a del credere obligation, unless specially stipulated, in which case the commission was always 15 per cent., and that even a merchant resident in the West Indies never undertook a del credere commission under 10 per cent.; and he contended, that 5 per cent. only, being allowed here by the charger in his summons, clearly proved that it was not the understanding of parties, that he should come under such a responsibility.

To this it was answered by Crichton, That no amount of commission was specified in the original agreement, and that although he had only proposed to allow 5 per cent., yet that was in consequence of Nicol having never objected, or demanded more; but that he was willing to allow 10 per cent., which, on inquiry, he admitted to be the commission generally allowed in circumstances like the present; and the Court, 'in respect of the offer now 'made to allow an additional 5 per cent.,' again adhered.

LORD ALLOWAY.—This is a very important question in commercial law, and the view I take of it is this: Certain goods are intrusted to Nicol, a shipmaster, by a person who knows that he is not to remain at St. Thomas, but to return immediately. Nicol grants a let-

ter of acknowledgment, which does no more than express the obligation which he would have incurred at common law, that he was to sell the goods, and bring home the proceeds. He finds, from the state of the markets, that they cannot be sold without a loss. He must then either sell at a loss, or bring the goods back, or leave them with another person. He accordingly places them in the hands of Miller, a respectable merchant, in good credit at the time; and in the circumstances, he was entitled to do so by the commercial law of the whole world. He then comes home, and communicates what he had done to Scott and Crichton, who make no objection, but, on the contrary, write to Miller with instructions regarding the goods, thus acknowledging his employment. By the time Nicol gets back to the West Indies, he finds the goods sold, but the price not paid, so that the letter of 12th February from Crichton (which was in fact merely a friendly request to look after the goods subsequent to the regular instructions to Miller, and could fix no obligation on Nicol,) was thereby superseded. Miller then sends home an account of sales. To this Crichton makes no objections for a year, and even then he does not complain of Miller's employment, but only that the account-sales is not sufficiently explicit; and he so far accepts this account as to make it the foundation of his action against Miller, and to conclude for the amount therein contained. This is a complete acknowledgment of Miller's authority to act. The latter, however, dies without remitting the proceeds, and the present action is brought against Nicol. In these circumstances, I cannot conceive that it ever was the understanding of parties that Nicol had undertaken a del credere obligation. He was not to account for the proceeds as a guarantee, but only on receiving the price, both at common law, and in terms of his letter of acknowledgment. The question comes simply to this, Is a person in such circumstances entitled to put goods into the hands of another consignee of good credit? I think that he is, and that the moment he gives notice to the consigner, and the latter does not object, he is totally and absolutely relieved from all responsibility; and in this case Crichton not only did not object, but he expressly acknowledged the authority of Miller. The amount of commission is of trivial importance, except as showing the understanding of parties. It is not now denied that 5 per cent. is not a del credere commission, and that sum only being allowed in the summons, shows the interpretation put by the parties on the contract; for it is justly stated by Mr. Fell, that 'in all cases where the words of the party promising 'are at all doubtful, the Court will take into consideration the situ-'ation and circumstances of the parties, to enable them to judge of 'their respective intentions and understanding at the time of the 'agreement made.'

Lord Glenlee.—I do not think that the question turns on whether this was a del credere commission or not; but it seems to me to be,

whether the shipmaster has been absolved from giving a proper account of sales, for as yet there has been no account at all. There was an obligation in the original missive to account for the proceeds of the goods, and so far from being relieved of this, Nicol undertakes it de novo, by accepting the letter of 12th February from Crichton, directing him to sell the goods if not sold, and if sold, to remit the proceeds. If Miller had sent a proper account of sales, there would have been a great deal to say for Nicol; but there has been no proper account of sales, for the one sent does not mention the names of the parties to whom the goods were sold. If the question had been with Miller, he never could have got off; and as Nicol, by accepting Crichton's letter of 12th February, undertook to sell, if not sold, and if sold, to remit the proceeds, he is still liable. There is, no doubt, an absolute necessity for holding it a suitable transaction in a shipmaster to leave goods consigned with him in another's hands as subagent, but he is still responsible that that person shall do the duty properly, especially if he afterwards undertake to see it done. I think, however, there is still room for allowing to Nicol deduction of commission besides that to Miller, which is of the nature of expenses of the sale.

LORD PITMILLY. — This is a case of circumstances, in which two questions arise. 1. Is Nicol accountable at all? and, 2. If so, on what terms? As to the first, I cannot doubt but that he is accountable, when I read the terms of his obligation. It is true that he did right to hand the goods over to Miller; but did that free him from responsibility? It is clear it did not. Crichton could know nothing of Miller. Nicol must be accountable for him, and I do not think the letters amount to a novatio. Then, second, On what terms is he to account? In relation to this, I think, that besides Miller's commission, he would have been entitled to commission for himself, had there been a proper account of sales; but, as there has not, I do not think that he can claim any commission for himself.

LORD JUSTICE-CLERK.—I am much of the same opinion with that last delivered. I do not say that Nicol was to stay at St. Thomas in order to sell the goods; but if he chooses to delegate the commission to another, he must be liable for the delegate that a proper account shall be rendered, which has not been done here, there being no mention of the purchasers. Then his receiving the letter of 12th February constituted the obligation anew. This is a case sui generis, and apart from the doctrine of del credere,—being an obligation to account for proceeds, which has not been fulfilled.

R. WELSH,—D. FISHER,—Agents.

W. GOLDER, Suspender.—*Neaves.* No. 98.
J. DEANS, Charger.—*Shaw.*

Process — Forgery — 6. *Geo. IV. c.* 120. — Manner of making up the record in cases where forgery is proponed.

Dec. 19. 1826.
2D DIVISION.
Lord Mackenzie.

GOLDER brought a suspension of a bill, alleging forgery, which was denied by the charger Deans. Both parties were desirous to close the record on the suspension and answers, but a difficulty having occurred as to the competency of doing so, the Lord Ordinary reported the case to the Court as to the manner in which the record should be made up. His Lordship stated that under the old form, the suspender was bound to propone improbation at the Bar, and consign £40 Scots:—that the charger then stated that he was ready to abide by the document, whereupon he was ordered to do so judicially;—and that, having done so, the case was prepared by articles improbatory and approbatory, which were truly mutual condescendences. His Lordship, however, observed, that there was no provision in the late Judicature Act for closing a record in this way, but that the difficulty might be obviated by holding the articles as condescendences, or condescendence and answers, and requiring them to be signed by the parties as formerly.

The Court were of the same opinion, and directed his Lordship that in such cases he should, after the consignation and abiding, order a condescendence of articles improbatory, and answers containing articles approbatory, which, after being revised and signed by the parties along with counsel, should be accompanied with pleas in law, and the record then closed.

CAMPBELL and MACDOWALL,—J. WILSON, W. S.—Agents.

A. RITCHIE, Suspender.—*Robertson—Currie.* No. 99.
J. MACKAY, Charger.—*D. of F. Moncreiff—Lumsden.*

Process—6. *Geo. IV. c.* 120.—Held not necessary, where a reclaiming note, accompanied with the record, has once been presented, to box a second copy of the record, along with subsequent reclaiming notes on other points of the cause.

Dec. 19. 1826.
2D DIVISION.
Ld. Cringletie.
B.

AFTER the decision of the points in this case, mentioned ante, Vol. II. No. 333, and Vol. IV. No. 349, the Lord Ordinary, 'in 'respect of the bill charged on being of itself probative of value, 'and there being no competent proof to the contrary,' repelled the reasons of suspension, and found the letters orderly proceeded. Ritchie then presented a reclaiming note, to the competency of which it was objected, that it was not accompanied with the record of the cause. The Court, however, repelled this objection,

on the ground that the record had been boxed with a former reclaiming note on one of the previous points of the cause; but, on the merits, they adhered to the Lord Ordinary's interlocutor.

C. GORDON, W. S.—W. DUTHIE, W. S.—Agents.

No. 100. M. and E. MIDDLETON, Pursuers.—*D. of F. Moncreiff—Maitland.*

Rev. J. YORSTOUN, Defender.—*Jeffrey—Walker.*

Implied Warrandice — Reparation.—Circumstances in which a party who, a few weeks before the judgment of the House of Lords setting aside the Queensberry leases, obtained a sublease of one of the farms 'to the termination' of the principal lease, but without any clause of warrandice, was held entitled to relief and damages from the principal tenant.

Dec. 19. 1826.

2D DIVISION. Ld. Cringletie. F.

THE defender held one of the farms of the Queensberry estate, under a lease containing a clause of absolute warrandice, for the period of 19 years from Whitsunday 1810. In part of this farm the pursuer Martin Middleton was subtenant, at a rent of £95, by a subtack which did not expire till 1821. This sublease he renounced on the 15th June 1819, (being about a month before the judgment of the House of Lords in regard to the validity of the Queensberry leases,) in consideration of a new subtack in favour of himself and his son Edward, at the increased rent of £115. The period of this subtack was stipulated to be 'from 'Whitsunday 1819 to the termination of Mr. Yorstoun's lease;' and it was declared that the farm was to be possessed, 'subject to 'all the regulations of the Duke of Queensberry's lease,' some of which had reference to the concluding years of the tack.

After the judgment of the House of Lords setting aside the lease of Halscar, a decerniture of removing was obtained against Yorstoun and Middleton, on a summons executed in 1815, which concluded for removing, and for violent profits, against both the principal and subtenant. Yorstoun thereupon raised an action of relief and damages against the executors of the late Duke of Queensberry under the warrandice in his lease; and Middletons, on the other hand, raised this action of relief and damages against Yorstoun, founding on their subtack from him.

In defence Yorstoun pleaded,

1. That as the sublease contained no clause of warrandice, he could only be held to have warranted against his own fact and deed; and,

2. That, in the circumstances of the case, the words 'to the 'termination of Mr. Yorstoun's lease' must have had reference to its termination by reduction, and was not equivalent in meaning to the 'expiry,' or 'for all the remaining years' of the lease.

To this it was answered,

1. That where no warrandice is expressed, absolute warrandice is implied; and,

2. That, at the period of accepting the sublease, the case of Halscar stood with a judgment of one Division, and the opinion of a majority of the whole Court, in favour of the tenant; and that the period which had elapsed from the hearing of the cause before the House of Lords, without judgment having been given, rather tended to increase the probability of an affirmance; and farther, that the circumstance of the pursuers having renounced a lease of which two years were to run, and of which the rent was £20 less than that in the new sublease, clearly showed that the period in view was the termination of the principal lease by its natural expiry only, which was also the true meaning of the expression.

The Lord Ordinary assoilzied the defender; but the Court altered, and found the pursuers entitled to relief and damages, and remitted to his Lordship to proceed accordingly.

T. Ranken,—W. Grierson, W. S.—Agents.

J. Durward, Petitioner.—*Brownlee.* No. 101.

Heritable Creditor—Interest.—An heritable creditor in a cognition and sale, having purchased the house over which his security extended, and paid up the arrears of feu-duties, allowed bank interest thereon.

Dec. 19. 1826.

2d Division.

Ld. Cringletie.

F.

The late James Dickinson was proprietor of a house held feu of Sir Henry Raeburn, over which he had granted an heritable bond to the petitioner Durward, who, in a process of cognition and sale at the instance of Dickinson's son and heir, purchased the house, and was obliged to pay at his entry arrears of a year and a half's feu-duty, of which, by the articles of roup, he was entitled to be relieved. In a petition for a warrant on the cashier of the bank in which he had consigned the price, to pay to him the amount of his bond and these feu-duties, he also craved warrant for payment of interest on the latter. His petition having been remitted to the Lord Ordinary, his Lordship reported that it had been objected to his claim, that he was not entitled to demand interest on the feu-duties paid by him, as they did not bear interest ex lege. His Lordship, however, stated, that as money must otherwise have been drawn from the bank to pay these feu-duties, he considered that it would be reasonable to allow him bank interest. The Court accordingly granted warrant to that effect.

A. Johnston, W. S. Agent.

No. 102. A. GORDON, Pursuer.—*D. of F. Moncreiff—More.*
ROYAL BANK of SCOTLAND, Defenders.—*Bell—Alison.*

Reparation.—A party having opposed an application to the Dean of Guild for leave to erect certain buildings, and having been successful in his opposition; but having made no appearance in the House of Lords, and not having intimated that he was not to oppose the appeal—Held, on the judgment having been reversed, that his conduct up to the date of the appeal was not relevant to subject him in a claim of damages; but the cause remitted, quoad ultra, to the Jury Court.

Dec. 19. 1826.
2D DIVISION.
Ld. Cringletie. B.

GORDON was proprietor of a shop behind the piazzas in the High street near the Parliament square, in the buildings burnt down by the great fire of 1824. In 1817 he had made an application to the Dean of Guild for a warrant to bring forward his shop to the line of the street under authority of the police act, 57th Geo. III. c. 53, which empowered the Dean of Guild to authorize the proprietors of such shops or houses 'to bring forward the same to 'the front of the said pillars, so as to include the areas of the said 'piazzas and recesses in the said shops and houses.' This application was opposed by the Royal Bank, who possessed a house behind the High street, occupied by them as their bank office, the entry to which was by a thoroughfare called the Royal Bank close, which opened into the High street under the piazzas in question, and which they alleged would be blocked up by the proposed erections. In support of their opposition, they maintained that the application was contrary to a provision of the statute, which declared that, 'in effecting these purposes, no encroach-'ments shall in any case be made upon the streets, public en-'trances, or foot pavements.' The Dean of Guild having granted the warrant craved, and the Bank having presented a bill of advocation, Gordon served them with a protest, stating that he had been offered nearly £250 a year for his proposed new shops, and that should the Bank prevent his going on with the building, he would hold them liable for all the loss thereby arising. The bill having been passed, and the letters expede, the Lord Ordinary (Lord Reston) remitted simpliciter, but the Court, on the 26th of February 1819, altered his Lordship's interlocutor, and dismissed the original application, 'in respect that, by the po-'lice act, no encroachment shall in any case be made upon the 'streets, public entrances, or foot pavements;' and to this interlocutor their Lordships adhered, on the 21st of May, by refusing, without answers, a reclaiming petition on the part of Gordon, who thereupon entered an appeal. The Bank lodged answers to the petition of appeal; but having shortly thereafter, in spring 1821, removed their office to the New Town, they sold their pre-

mises behind the High street, and in the articles of roup it was declared, that they were 'to take no further concern with the 'lawsuit under appeal at the instance of Mr. Andrew Gordon;' and accordingly they lodged no appeal case in the House of Lords. They did not, however, intimate to Gordon that they were not to insist in the cause; but they alleged that he must have known that they were not, as he had been an offerer for a part of the property exposed to sale under the articles of roup above mentioned. The cause came on for hearing in the House of Lords in February 1823; but there being no appearance on the part of the Bank, judgment was delayed till June thereafter, when the interlocutors were reversed.* Gordon then raised this action, concluding against the Bank for £2000, as the actual loss and damage sustained by him in consequence of the proceedings on the part of the Bank; and he contended,

1. That as no person could make any alteration, even on his own property within burgh, without an application to the Dean of Guild, any party opposing such an application was truly in petitorio, and in fact following out proceedings of the nature of an interdict; and that, as the Bank had adopted this method, instead of an action of declarator or reduction of the Dean of Guild's warrant, which would have left him at liberty to carry on his operations suo periculo, they must be liable to him in the damages thereby occasioned; and,

2. That the Bank were bound to have intimated to him their abandonment of the action, so as to have enabled him to proceed with his buildings; but that not having done so, they were at least liable in damages subsequent to the appeal.

To this it was answered,

1. That Gordon was, in point of fact, in petitorio, while the Bank were merely defenders; but that, at any rate, no litigant could be subjected in damages for carrying on a suit, unless it was done maliciously, and without probable grounds, which was not alleged to have been the case here; and,

2. That the Bank had not, properly speaking, abandoned the case, but had merely left it to the purchaser to carry it on, if he saw cause; and that Gordon must necessarily have known their intention not to carry it on further, as he had been a bidder under articles of roup which expressly mentioned this.

The Lord Ordinary having reported the case, 'in respect the 'parties have stated no case as a precedent for enabling the Lord 'Ordinary to determine the relevancy of this action, and that it

* See 1. Shaw's Appeal Cases, p. 452.

'is of importance that it should be immediately settled,' the Court found that there were no grounds for damages prior to the date of appeal, and remitted to the Jury Court, in relation to the claim of damages subsequent to that period.

LORD JUSTICE-CLERK.—This is a very unusual case; but I think that the pleas of the Royal Bank are more correct than may at first sight have appeared. I have looked back to the proceedings in the former case, and I see that our judgment was pronounced after a deliberate view of the premises, which satisfied us, that on a fair construction of the act of Parliament, the proposed erections would occasion an encroachment on one of the public entrances to the Royal Bank, which was of very great convenience both to them and to the public. In these circumstances, is it possible to say that the Bank are to be subjected in damages for opposing Gordon's application, and trying a question in which this Court held them to be in the right? There was nothing vexatious, improper, or malicious in their conduct, at least prior to the appeal; and it is only on grounds of such a nature that damages can be demanded on account of legal proceedings. After the appeal had been taken, however, and the Bank had determined to give up the case, they ought not to have let it still hang up in the House of Lords for two years. Here it is that I hesitate to say that there may not be a claim for damages. I do not say that damages are due, but I think that there is room for a remit to the Jury Court to try that question. As to the period before the appeal, however, we must at once assoilzie from any claim of damages for opposing Gordon's application before the Dean of Guild and in this Court.

LORD ALLOWAY.—There are most important points of law involved in this case, but I concur in the opinion delivered from the Chair. I can see no difference between the situation of a pursuer and a defender in cases of this kind. Whoever wrongously disturbs another in the possession of that of which he is in full enjoyment, must be liable for the consequences. But that is not the case here. It was Gordon who proposed to make the alteration on the state of possession, and he could do nothing without the authority of the Dean of Guild. He applies for this accordingly; but though the warrant was granted, it was advocated, and there was no right vested in him till the judgment of the House of Lords. The Bank were merely trying their rights; and I know of no principle in law by which a party is to be subjected in damages for trying his rights in a Court of Law, merely because he has been unsuccessful. No doubt, if he act malâ fide, an action of damages may arise, but only from his improper conduct, and that without regard to whether he is pursuer or defender. But, in the present case, after a judgment of this Court in favour of the Bank, it is impossible to maintain that they were in mala fide. Any doubt I entertain arises as to the period

mentioned by the Lord Justice-Clerk. The appeal was entered in 1819, and no step was taken by the Bank after lodging answers, and they at last abandoned it altogether. I apprehend they were not entitled to let it hang up, but should have intimated this abandonment to Gordon. If any damage at all is due, it must commence at the time of the appeal; and I think that there are sufficient grounds on this point to warrant at least a remit to the Jury Court.

Lord Pitmilly.—I have no doubt that the Bank are not liable for any thing done by them before the appeal; but I hesitate very much in going so far as has been proposed in regard to the subsequent period. It is necessary to attend to the circumstances in cases of this kind, and I cannot throw out of view that it was Gordon who was here in petitorio. There is a marked distinction between the situation of a man applying to show authority under a statute for making an encroachment which he could not previously have done, and a person making alterations on his own property. Any of the neighbours were entitled to appear to oppose Gordon's application, which was necessarily made periculo petentis. If he wished to go on with his building, he should have come forward and stated that he was ready to take the risk, and find caution for pulling it down, in case he should be found in the wrong, as was done in the case of Butterworth, in regard to certain buildings behind Charlotte square. It is clear that the Bank cannot possibly be liable in damages, up to the date of the judgment in this Court, for exercising a privilege as to which that judgment found him to be in the right; and as to the subsequent period, they sold the premises, and had no longer any interest to carry on the action, which they left to the purchaser to follow out, if he saw cause; nor can I see that this should subject them in damages. No doubt, if they had resolved to allow Gordon to build, and did not notify this to him, they might have been liable; but that was not the fact. They merely sold the property, and left the right to oppose Gordon's buildings as a valuable privilege to the purchaser, as is proved by the articles of roup. Surely they were entitled to do this; and, on the whole, therefore, I would be for assoilzieing in toto, especially as Gordon's offer at the roup goes far to prove that he must have read the articles; but, at the same time, I will not resist the proposed general remit to the Jury Court, which is not to exclude the plea on the part of the Bank.

Pursuer's Authorities.—Clark *v.* Thomson, Nov. 8. 1816, (F. C. and 1. Murray, 161); Paterson *v.* Blair, July 14. 1819, (2. Murray, 177); Cameron *v.* Cameron, March 14. 1820, (2. Murray, 232.)

Defenders' Authorities.—Lord Eldon in Arbuckle *v.* Taylor, (3. Dow, 180); Duff, May 19. 1826, (ante, Vol. IV. No. 16.)

W. and A. G. Ellis, W. S.—J. Dundas, W. S.—Agents.

No. 103. J. MENZIES, Esq.—*Sol.-Gen. Hope—Shaw Stewart.*
Sir G. ABERCROMBY and Others.—*D. of F. Moncreiff—Rutherfurd—G. Robinson.*

Freehold Qualification—Member of Parliament.—A claim for enrolment as a Freeholder having been rejected on the ground of nominal and fictitious, the Court, after ordering and advising written interrogatories and answers subscribed by the claimant, repelled the objection.

Dec. 21. 1826.
1st DIVISION.
Lord Eldin.
H.

MR. MENZIES presented a petition and complaint, stating that at the Michaelmas Head Court of the Freeholders of the county of Banff he had applied to be enrolled, as vested in the liferent superiority of certain lands affording the requisite qualification; but it having been objected by Sir George Abercromby and others that his right was nominal, fictitious, and confidential, the freeholders had, without any evidence of that allegation, and although he was not present, refused to enrol him. The Court having remitted the case to the Lord Ordinary to prepare the cause, and his Lordship having thereafter reported it, they appointed written interrogatories to be put to Mr. Menzies, and required him to give in answers to them, signed by himself. This having been done, and the Court being satisfied that the allegation had not been established, granted warrant for enrolling Mr. Menzies in his proper place.

MACKENZIE and SHARPE, W. S.—INGLIS and WEIR, W. S.—Agents.

No. 104. LOCKWOOD and Co. and T. MEGGET, W. S. Complainers.—*Jeffrey—Brownlee.*
C. F. DAVIDSON, W. S. Respondent.—*Cockburn—Maidment.*

Process—Summary Complaint.—Circumstances under which a summary complaint against an agent, for an alleged irregularity in conducting an action, was dismissed.

Dec. 21. 1826.
1st DIVISION.
Lord Medwyn.
S.

LOCKWOOD and COMPANY, together with their mandatory and agent, Thomas Megget, writer to the Signet, presented a petition and complaint, stating, that in an action depending between them and Robert Davidson before Lord Medwyn, a diligence and commission had been granted to Davidson, for recovering certain writings at Huddersfield in England:—that after it had been executed, the commissioner, by mistake, had sent the writings to their agent Mr. Megget, whereas he ought to have sent them to the respondent, who was the agent of Mr. Davidson:—that Mr. Megget thereupon placed the writings in the

hands of the clerk of the process, and informed the respondent of this, whose duty it was to make up an inventory of these writings;—that on the faith that he would do so, Lockwood and Company had obtained an order on themselves to lodge a condescendence, to the preparation of which it was necessary that they should have access to these writings by borrowing them from the clerk; but that, the respondent having failed to make up the inventory, they could not get them, whereby they were unable to lodge their condescendence within the proper time, and had on that account been subjected in £5. 5s. of expenses. They therefore prayed that the respondent should be ordained to pay to them that sum, and the other expenses which they had incurred in relation to this matter; and that such further fine or censure should be inflicted on him as the Court might see fit. At the same time Lockwood and Company reclaimed against the award of these expenses, and their reclaiming note was sent to the roll.

In defence, the statements of the complainers were denied, and it was pleaded, that the petition and complaint was incompetent,

1. Because there was no offence nor crime charged against the respondent, but merely an irregularity in the mode of conducting business.

2. Because, as there was a prayer for fine and censure, the Lord Advocate ought to have been a party; and,

3. Because the interlocutor awarding the expenses complained of was under the review of the Court in proper form.

The Court, in the circumstances, recalled the interlocutor awarding expenses, dismissed the complaint, and found expenses in relation to it due to neither party.

The Lord President observed, that if the commissioner had committed a mistake in sending the papers to Mr. Megget instead of to the respondent, he ought to have corrected that mistake by delivering them to the respondent instead of to the clerk; but as there appeared to be errors on all sides, no expenses should be awarded.

T. Megget, W. S.—C. F. Davidson, W. S.—Agents.

No. 105.

D. MILHOLLAN, Pursuer.—*Cockburn—Cuninghame.*
R. BERTRAM and Gen. DALRYMPLE, Defenders.—*Jeffrey.*
A. HYSLOP and A. MILLAR, Defenders.—*D. of F. Moncreiff—Rutherfurd.*

Reparation—Process.—Held not necessary to libel malice in an action of damages against Magistrates for wrongous imprisonment and oppression, and founded on alleged irregularities.

Dec. 21. 1826.
1st Division.
Lord Eldin.
D.

MILHOLLAN raised an action of wrongous imprisonment and oppression against the defenders, concluding for damages. In support of it he stated that he was a licensed pedlar and hawker, and that, while he was travelling on the road from North Berwick to East Linton in company with another pedlar, Francis M'Peat, on Saturday the 21st of January 1824, they were stopped by a person of the name of Plain, who represented himself as a constable, and demanded exhibition of their licenses as pedlars:—that the pursuer immediately exhibited his license, but that M'Peat being unable to do so, Plain took them both into custody, and carried them to an inn at North Berwick:—that they were then brought into the presence of the defender Mr. Bertram, one of the bailies of that town, to whom the pursuer exhibited his license, but, notwithstanding thereof, he sent him, along with M'Peat, to gaol, to remain there till General Dalrymple, a Justice of the Peace, should return from shooting:—that they were placed in a room of the gaol along with a black servant of General Dalrymple's, who was confined there for a crime:—that after having been detained for several hours in gaol, they were brought into the presence of General Dalrymple in the council-room, to whom also the pursuer exhibited his license, and required his liberation; but the General refused to do so, and granted a warrant to an officer to carry both him and M'Peat forthwith to Haddington, and there 'to deliver them over to the proper authority:'—that under this warrant they were carried under an escort of several persons to Haddington, and there committed to gaol on the Saturday night, when their packs were taken from them:—that they were confined in gaol without any warrant till Monday morning, when they were brought before the defender Mr. Hyslop, provost of that town, to whom the pursuer exhibited his license, and demanded redelivery of his pack, and that Mr. Hyslop ordered him to be liberated, but refused to give up the pack. The pursuer, however, did not allege that these acts had been done by the defenders maliciously, but he stated that they had been done illegally and oppressively, to the injury of his feelings, and to his

loss both in trade and in character; and, besides concluding for damages, he demanded restitution of his pack.

No appearance was made for Plain the constable, who was called as a party, and decree in absence passed against him.

In defence it was stated by Mr. Bertram, That the pursuer and M'Peat had been brought before him as one of the bailies of North Berwick by Plain, on a charge of hawking goods on their separate accounts, with only one license between them:—that as this was a breach of the Pedlars' Act, and as it appeared that the offence had not been committed within his jurisdiction, and of which he could not judge, it was his duty to detain them till they could be brought before a competent Magistrate:—that accordingly he had done so, and therefore there was nothing irregular on his part.

By General Dalrymple it was stated, That the pursuer and M'Peat had been brought before him as a Justice of the Peace, charged with the above offence; and that, on examining them, they admitted sufficient to require him to detain them for the purpose of trial; and they having stated their inability to find caution to appear at the next Justice of Peace Court, he had no alternative but to transmit them to the proper authority at Haddington. Both he and Mr. Bertram, however, denied the allegation that the pursuer had been committed to the gaol of North Berwick, or placed in a room along with a criminal.

On the part of the gaoler of Haddington it was stated, That the pursuer and M'Peat were brought to the gaol under the above warrant of General Dalrymple on the Saturday night; that it was his duty to receive them; and that they were accordingly detained till the Monday morning, when they were liberated by order of the Justices.

By Mr. Hyslop, the Provost of Haddington, it was stated, That on the parties being brought before him and another Justice of the Peace on the Monday, they took their declarations, from which it appeared that the charge was well founded; but that, as they wished the matter to be decided by the General Monthly Court, they liberated them, and granted warrant for detaining their packs, to be preserved in modum probationis.

When the case came before the Clerks of the Jury Court for preparing Issues, they considered the summons irrelevant, because there was no allegation of malice; and, on a motion to the Court, the case was remitted to the Court of Session to have that point decided.

On the part of the defenders it was contended, That as no irregularity had been committed by any of them, it was essential,

to found a claim of damages, that the pursuer should allege that the proceedings had been adopted against him maliciously.

To this it was answered, That the pursuer had stated in his summons a sufficient and relevant cause of action against all the defenders; that he was entitled to have the matter investigated by a Jury; and that it was not requisite that he should libel malice.

The Lord Ordinary, 'in respect that there is no charge of malice in the libel against the defenders, or either of them, so as to be the foundation of a conclusion for damages, and also in respect that the pack or box belonging to the pursuer was detained by the Justices in the course of their judicial proceedings against them, as vouched by the record,' found the action irrelevant, dismissed the same, and found expenses due.

The pursuer having reclaimed, the Court, without calling on his counsel to reply, unanimously altered, 'found that it is not necessary in the present case that there should be a charge of malice libelled,' found expenses due, and remitted the case of new to the Jury Court.

LORD GILLIES.—All that we have to consider at present is the averments in the summons, which the pursuer undertakes to prove, and whether the ratio assigned by the Lord Ordinary of no malice being alleged is sufficient to dismiss the action. The case is rested on allegations of a series of illegal and oppressive acts, which are denied by the defenders; and therefore the case must go before a Jury for expiscation.

LORD CRAIGIE.—I also think that this matter must be investigated; and therefore the interlocutor must be recalled, and the proper steps taken for having that inquiry made.

LORD PRESIDENT.—The pursuer avers irregular proceedings, and it is admitted that, in point of law, in such a case it is not necessary to libel malice; but then the defenders deny the pursuer's averments, so that the parties are at issue in point of fact, and consequently there must be an investigation by means of a Jury.

J. GREIG, W. S.—TOD and HILL, W. S.—P. CROOKS, W. S.—Agents.

No. 106.

T. SCOTT, Suspender.—*Rutherfurd.*
J. PATISON Junior, W. S. Charger.—*Skene—Wilson.*

Sequestration—Trustee.—Held that a trustee on a sequestrated estate, who sists himself as pursuer of an action in place of the bankrupt, is liable to make funds forthcoming in the event of the defender being found entitled to expenses; and that it is not relevant to allege that the funds of the estate are exhausted.

Dec. 21. 1826.

1ST DIVISION. Bill-Chamber. Ld. Corehouse. D.

THE pursuer of an action having become bankrupt, and his estate having been sequestrated, the suspender Scott sisted himself in his place as his trustee, and the litigation was thereafter carried on at his instance. The charger Mr. Patison was agent

for the defender, and, after considerable litigation, the defender was assoilzied, with expenses, and decree for them was issued in name of Mr. Patison against Scott as trustee. On this decree he charged Scott, who suspended, and stated that as he had no funds, and as the decree proceeded against him in his character of trustee, he was not liable personally.

In answer to this it was maintained, That as a trustee, in contracting with a third party, is bound to have funds ready to implement his obligation, and as Scott sisted himself as pursuer of the action, he was bound to see that he had funds to meet the expenses which might be awarded to the defender, and therefore it was not relevant to allege that he had no funds.

The Lord Ordinary refused the bill, and the Court adhered.

LORD PRESIDENT.—The trustee represents the creditors, to whose funds the trustee may have access. Perhaps there are no funds of the bankrupt, but a third party has nothing to do with that. He transacts with the trustee as representing the creditors, and on their credit. Examples of this daily occur, where the funds of the bankrupt are inadequate to pay the expenses of the law agent employed by the trustee; and the same principle applies to this case. The creditors were the true pursuers, being merely represented by the suspender, who must seek his relief from them.

LORD GILLIES.—I am of the same opinion. The creditors form a corporation represented by the trustee, who, in contracting with third parties, is bound to make their funds forthcoming.

LORD CRAIGIE.—I have considerable doubts on this point; and at all events I think that we should give time to the trustee to recover funds from the creditors.

G. SCOTT,—D. WILSON, W. S.—Agents.

A. M'DONALD, Complainer.—*Brown.* No. 107.
A. M'DONALD, Respondent.—*Sol.-Gen. Hope—Handyside.*

Factor loco Tutoris—Protutor.—A complaint having been made against a party as factor loco tutoris, and he having alleged in defence that he was a protutor, and that therefore the complaint was irregular, the Court, being satisfied that such was not the fact, repelled the defence.

ANGUS M'DONALD presented a petition and complaint against the respondent in the character of factor loco tutoris upon his estate. In defence he objected, That although he had been appointed factor loco tutoris for a special purpose, yet he, along with certain other persons, had been previously chosen by the nearest relations to act in the capacity of tutors; that it was in

Dec. 21. 1826.
1ST DIVISION.
Lord Medwyn.
S.

this character, and not as factor loco tutoris, that he had acted; and therefore that the complaint ought to be dismissed.

To this it was answered, That his appointment as factor loco tutoris was perfectly general; that it superseded the former nomination; and that he had intromitted in that capacity alone.

The Court, on the report of the Lord Ordinary, being satisfied that he had acted as factor loco tutoris, repelled the objection.

H. MACQUEEN, W. S.—A. STEVENSON, W. S.—Agents.

No. 108.

A. BURNS, Petitioner.—*Wilson.*
P. M'KENZIE, Respondent.—*Skene.*

Sequestration—Interim Factor.—A person who had been allowed by the creditors to enter into possession of a sequestrated bankrupt's estate as interim factor, without finding caution, ordained, pending a competition for the office of trustee, to find caution, and ordered that, on his failure to do so, the management should devolve on the Sheriff-clerk of the county.

Dec. 21. 1826.
2D DIVISION.
B.

THE estates of M'Aulay, lime-merchant and writer in Dumbarton, having been sequestrated, a meeting was held for the election of an interim factor, when each of two parties of the creditors protested that their respective candidates, Burns the petitioner, and M'Kenzie the respondent, had been duly elected. The latter was, however, allowed to act and take possession of the bankrupt's effects; but no security was exacted from him by the creditors. At the subsequent meeting for the election of a trustee, a majority of the creditors voted for Burns; but M'Kenzie, who was also a candidate, contended that he was elected by a majority of legal votes; and both parties presented petitions for confirmation, which were, as usual, remitted to the Sheriff to report.

Pending the discussion in this disputed election, Burns presented a petition, stating that M'Kenzie, in his character of interim factor, was proceeding to sell the bankrupt's effects, without having found any caution, and praying to have the management of the estate devolved on the Sheriff-clerk of the county.

The Court appointed M'Kenzie to find caution, as interim factor, to the satisfaction of the Sheriff, within four days, and ordered that, on his failure so to do, the management of the estate should devolve on the Sheriff-clerk.

W. MERCER, W. S. Agent.

J. PADON, Suspender.—*D. of F. Moncreiff—Cockburn.*
BANK of SCOTLAND, Chargers.—*Skene—Walker.*

No. 109.

Cautioner—Cash-Credit Bond.—A Bank having granted a cash-credit, to be operated on by a company consisting of three partners, on security of a bond to which the company, and the individual partners as such, and as individuals, were parties, and having continued to make advances to the company after the retirement of one of the partners, duly notified in the Gazette, and specially to the Bank—Held that the retired partner was not liable under the bond for a balance arising on advances so made.

Dec. 21. 1826.

2D DIVISION.
Ld. Cringletie.
M'K.

IN the year 1816, J. and A. Tod and Company, of which the partners were, John Padon, James Tod, and Andrew Tod, obtained from the Bank of Scotland a cash-credit to the extent of £1000, in security of which a bond was granted to the Bank in the following terms: — 'We, James and Andrew Tod and 'Company, merchants in Borrowstounness, as a copartnery, 'James Tod, merchant there, Andrew Tod, merchant there, and 'John Padon, merchant there, as individual partners of the said 'copartnery, and as separate individuals; and we, Andrew Cowan, 'merchant in Glasgow, and John Cowan, brewer at Anderston 'near Glasgow: Whereas the Directors of the Bank of Scotland 'have agreed to give us a cash-account or credit with the said 'Bank to the extent of £1000 sterling, in name of the said 'James and Andrew Tod and Company, in the books and at the 'office of the said Bank in Edinburgh, or at such other office 'thereof as the said Directors may afterwards appoint from time 'to time; therefore we hereby bind and oblige ourselves, con-'junctly and severally, and our heirs, executors, and successors 'whatsoever, to make payment to the Governor and Company of 'the Bank of Scotland, or to their assignees, of such sums, not 'exceeding £1000 sterling, as shall have been advanced by or 'for the said Governor and Company, on the order or receipts of 'the said James and Andrew Tod and Company, or as they shall 'have become liable for to the said Governor and Company by 'bills, promissory notes, or other obligations, with all or any of 'which we hereby consent that the said cash-account may be 'debited at any time during the liability foresaid, and to make 'such payment whenever such payment shall be demanded after 'six months from the date hereof, with the lawful interest.'

In 1821 an advertisement was inserted in the Gazette, intimating that Padon had ceased to be a partner of J. and A. Tod and Company, and that in future the concern would be carried on under the same firm by the two other partners; and a special notification to the same effect was sent to the Bank, as was estab-

lished to the satisfaction of the Court in a proof taken in this cause. At the date of this intimation, the balance against J. and A. Tod and Company under the cash-credit amounted to £788. The firm, however, still continued their operations, in the course of which all the vouchers constituting that balance were delivered up to the company, who in 1822 had drawn out the whole amount of the credit. The Bank having thereupon intimated to all the parties to the bond that they required the sum to be paid up, Padon brought a suspension as of a threatened charge, on the ground,

1. That by the bond he had merely guaranteed those advances which should be made by the Bank to that company of J. and A. Tod and Company, of which he was a partner; but that the Bank having gone on to make advances, after his retirement, to what was in fact a different company from that stipulated in the bond as the one to which the cash-credit was to be given, he was not bound for any balance arising out of their operations; and,

2. That as to the balance due at the date of his retirement, it had been extinguished, and the documents constituting it delivered up or cancelled.

To this it was answered by the Bank,

1. That the manner of taking Padon and the other partners bound not only as individual partners of J. and A. Tod and Company, but also in their separate characters as individuals, was intended by the parties to provide for the case of any of them retiring from the company, and to ensure their liability notwithstanding such an event, agreeably to what they averred to be the general practice of all Banks in Scotland.

2. That although in the case of a third party becoming bound for a cash-credit granted to a company, he was not liable for advances made after the retirement of a partner, seeing that he thereby lost the benefit of recourse against that partner, on which he had calculated when he became bound; yet that in a case, like the present, where the retiring partner himself had become bound, not only as a partner, but as an individual, there was no such ground for liberating him, as he could not state that he had lost any security or recourse against a third party, he himself being the only partner who had retired.

3. That at all events, on the principle of the case of Houston *v.* Speirs, the payments made by the company after Padon's retirement could not be imputed in extinction of the balance then due, except in so far as they had at any time exceeded the advances subsequently made by the Bank; and,

4. That there had been no actual retirement by Padon from

the company, but that the intimation to that effect was merely a collusive device to avoid responsibility for their debts.

The Lord Ordinary suspended the letters simpliciter, 'reserving to the chargers, if so advised, to subject the suspender on the ground that he never retired from the company, and to him his defences as accords;' and the Court unanimously adhered.

Lord Justice-Clerk.—It being perfectly clear that the balance, as it stood at the date of Padon's retirement, has been extinguished, the simple question remains, Whether, after a change of the partners of the company for whose use the credit was granted, the cautioners can be held liable for the transactions with a different company? And I am clearly of opinion, that as the intimation to the Bank is sufficiently proved, and as they subsequently continued to make advances to a company quite distinct from that to which the credit was granted, it is impossible to find the suspender liable.

Lord Glenlee.—Padon came under two distinct obligations,—one as a partner, and the other as a cautioner. The company to which the advances were stipulated to be made, was described as composed of three partners specially mentioned. On a change of partners, therefore, it was incumbent on the Bank to ask the cautioners if they were willing to continue bound for the new company; and not having done so, they are free. This rule must clearly apply to the strangers who are cautioners, and I cannot distinguish between their case and that of Padon.

Lord Alloway concurred, and observed that the case of Houston *v.* Speirs did not apply to the circumstances of the present.

Lord Pitmilly likewise concurred.

Suspender's Authority.—2. Bell, 645.
Chargers' Authorities.—Bell, 1. 282. and 2. 645; Speirs, June 22. 1822, (ante, Vol. I. No. 566); Houston, June 25. 1824, (ante, Vol. III. No. 126.)

Greig and Peddie, W. S.—H. Davidson, W. S.—Agents.

I. and S. Austin, and their Tutor ad Litem, Pursuers.—*D. of F. Moncreiff—Shaw.*
D. Wallace and A. Dunn, Defenders.—*Skene—Wilson.*

No. 110.

Tutors and Curators—Title to Pursue.—1.—Tutors, who had intromitted with their pupils' effects before making up inventories, removed as suspect;—and,—2.—The disclamation of the nearest of kin in an action for removing tutors no bar to the title of the pupils, and a tutor ad litem to insist in it.

This was an action originally raised at the instance of William, Isabella, and Samuel Austin, pupils, and also of their mother, Mary Nixon, as their nearest of kin, for the purpose of having Wallace and Dunn, tutors nominated by their deceased

Dec. 21. 1826.
2d Division.
Lord Mackenzie.
F.

father, removed as suspect on the ground, 1. That they were notour bankrupts, having been repeatedly incarcerated for trifling sums of money; and, 2. That although they had not made up inventories in terms of the act 1672, c. 2, for two years after the death of the pupils' father, they had nevertheless intromitted with part of the property of the pupils, and in particular had entered on the management of a pottery belonging to them.

To this it was answered,

1. That they were ready to find caution; and,

2. That although it was true that they had taken possession of the pottery, yet they had now made up inventories.

The Lord Ordinary, after appointing Mr. Fisher tutor ad litem to the children, found, 'that there is sufficient ground for removing the defenders from their office of tutors,' and decerned in the removing accordingly. The defenders then reclaimed, and having obtained from William Austin, who was now fourteen years of age, and from the mother, a disclamation of the action, they contended that there was no longer any title on the part of the remaining pursuers to carry on an action of removing tutors as suspect; because,

1. The original instance of the mother, who had married a second husband, was inept, there having been no concurrence on the part of her husband for his interest; and,

2. At all events, she having now disclaimed the action, it must fall, as it could not be carried on without the concurrence of a co-tutor, or the pupil's nearest of kin.

To this it was answered,

1. That as it was merely the concurrence of the mother, as nearest of kin, which was requisite, there was no necessity for her husband's appearance in the process to validate that concurrence; and,

2. That the process having been regularly brought before the Court, and a tutor ad litem having been appointed to the pupils, he was entitled to carry on this action for their behoof.

The Court unanimously sustained the title, adhered to the Lord Ordinary's interlocutor, and remitted to the Sheriff of Lanarkshire (where the pupils resided, and the property was situated,) to recommend a proper person to be appointed factor loco tutoris, and thereafter nominated to that office the person so recommended.

Their Lordships were unanimously of opinion, that the cause having been once brought before the Court, and a tutor ad litem appointed to the pupils, the disclamation of one of them, and of the mother, (as to whom it was only necessary that she should concur, the nearest of kin in such cases not being domini litis,) could not prevent the other pupils and their tutor ad litem from following out the action;

and, on the merits, that the defenders having intromitted as tutors before they had made up inventories, it was imperative on the Court to remove them.

Pursuers' Authorities.—1672, c. 2; 1. Erak. 7. 21; Turnbull, Feb. 9. 1698, (16317); Gibson, July 2. 1680, (16299); Burnet, March 1685, (16307); Gibson, Dec. 21. 1811, (F. C.)

Defenders' Authorities.—Gibson v. Thomson, Dec. 21. 1811, (F. C.); Robb, Dec. 22. 1814, (F. C.)

C. Fisher,—J. Patison Jun. W. S.—Agents.

D. Wallace, Suspender.—*Skene—Wilson.*
W. Anderson, Charger.—*D. of F. Moncreiff—Shaw.*

No. 111.

Decree in Absence—Passive Title.—Held,—1.—That a decree against pupils and their tutors, pronounced after appearance of the pupils and one tutor, was not to be held as a decree in absence as to another tutor who had not appeared;—and, —2.—That intromission by a tutor before making up inventories, but which were afterwards made up, did not subject him personally in payment of debts affecting the estate.

Dec. 21. 1826.

2d Division. Lord Mackenzie. F.

The late John Austin, by his deed of settlement, conveyed all his property to Mary Nixon, his wife, and to his children; to the latter of whom he nominated the suspender Wallace and Archibald Dunn tutors and curators. Some time before his death, he had granted to one Lashlie a bill for £30. This bill having passed into the hands of the charger Anderson, he raised an action thereon before the Sheriff of Lanark, concluding for payment against Mary Nixon, (the mother,) William, Isabella, and Samuel Austin, (the children,) Archibald Dunn and David Wallace, all conjunctly and severally, 'as representing the said 'John Austin sub titulis passivis.'

Defences were lodged to this action in name of the widow and children, and of Dunn; but not in name of Wallace. After some procedure, the Sheriff decerned in general terms against all the defenders, except Dunn; and on this decree Anderson charged the several parties, and was proceeding to poind certain effects of the deceased, when a bill of suspension was presented by Wallace, on the ground that the decree against him had been pronounced in absence, and praying that the cause might be remitted to the Sheriff, as being a decree in absence.

The bill having been passed, (see ante, Vol. III. No. 370,) and the letters expede, the suspender, besides his plea on the head of absence, contended, on the merits, that there were no grounds for rendering him liable for the debts of the deceased.

For the charger it was pleaded,

1. That the decree could not be considered as in absence.

2. That in so far as regarded the poinding, which was executed, not against the suspender's effects, but against those of the deceased John Austin, he had no title to interfere in his own name alone; and,

3. That the suspender had rendered himself personally liable by his intromission with the effects of the deceased, without having made up inventories as tutor.

The Lord Ordinary found, 'that in the circumstances of this 'case it is not possible to make a simple remit to the Sheriff, as 'in cases of decreets in absence;—that the decreet complained of 'is ambiguous in one respect, namely, in so far as it decerns 'against the complainer, without limiting the decerniture against 'him to his capacity of tutor and curator to the children of the 'deceased John Austin, although it does not appear that he was 'otherwise personally liable in the debt decerned for;—that to 'this extent it appears competent for the complainer to apply in 'his own name alone for suspension of said decreet.' His Lordship therefore suspended 'the said decreet, in so far as it contains 'any decerniture against the said complainer personally; but, 'quoad ultra,' found 'that this suspension, being in the name of 'the complainer alone as an individual, appears incompetent;' and therefore dismissed the same, finding no expenses due to either party.

Against this interlocutor both parties reclaimed; but the Court unanimously adhered.

Suspender's Authority.—3. Erak. 9. 52.
Charger's Authorities.—3. Stair, 9. 3; 3. Erak. 9. 49.

J. PATISON Jun. W. S.—C. FISHER,—Agents.

No. 112. Duke of QUEENSBERRY'S EXECUTORS, Pursuers.—*Rutherfurd.* C. TAIT, Defender.—*Tait.*

Interest—Agent and Client.—In an accounting between an agent and his employer, the Court allowed the balances to be struck annually, so as to charge compound interest, and also the interest of an heritable debt retained in security of certain obligations of warrandice to be annually accumulated in the same way.

Dec. 21. 1826.
2D DIVISION. Lord Pitmilly. B.

IN the action mentioned ante, Vol. I. No. 486, (which see,) the Court remitted to Mr. Brown, an accountant, to report on the state of accounts and alleged overcharges by Mr. Tait and his father, as law agents for the late Duke of Queensberry. Mr. Brown accordingly gave in a report, in which he taxed off a con-

siderable sum, and struck an annual balance on the accounts, charging interest on each balance, which again entered into the next year's account, thus becoming subject to the operation of strict compound interest; and in regard to an heritable debt due by Mr. Tait to the late Duke, (which Mr. Tait was held entitled to retain in security of obligations of warrandice come under by him to the Queensberry tenants,) he made an annual accumulation of interest at 3 per cent. This report was approved of by the Lord Ordinary; but Mr. Tait reclaimed against his Lordship's interlocutor, and stated various objections to the accountant's report, and in particular to the annual accumulation of the interest on the heritable debt; but he did not rest any objection as to the method of calculating interest on the accounts-current.

The Court, in reference to the heritable debt, ultimately found that it 'fell to be accumulated annually from and after the 11th 'day of July 1817, the date of the last accumulation of interest, 'and that at the rate of interest allowed for the time by the pub-'lic chartered banks upon deposit accounts;' and in regard to certain other objections, their Lordships remitted to Mr. Aytoun, writer to the signet, along with Mr. Brown, to report on the amount taxed off by the latter from Mr. Tait's law accounts.

On receiving their reports, the Court approved of Mr. Brown's 'report as amended in his additional report, with the additional 'allowances recommended in the report of Mr. Aytoun,'—and thereafter they remitted again to Mr. Brown to alter his report agreeably thereto. Mr. Brown did so accordingly in an amended report, in which, in regard to the heritable debt, the interest was accumulated annually since 1817, and interest charged on the balance so accumulated, such interest being added to the next year's balance, and interest charged thereon as one accumulated principal sum; and in regard to the other accounts, the balances were struck annually, and interest charged, as had been done in the original report, with this difference, that he had added thereto progressive interest, accumulated on the same principle, on the several taxations ultimately sustained by the Court, (extending to £3365,) which progressive interest on the taxations amounted to £2054.

To this report Mr. Tait lodged objections, in which he contended,

1. That the sort of accumulation on the heritable debt adopted by the accountant was not sanctioned by the interlocutor of the Court, the meaning of which was, that each year's interest was to be accumulated, so as to form a fund bearing simple interest,—

not that this interest on interest should be annually accumulated, so as to yield the strictest compound interest; and,

2. In regard to the interest on the accounts-current, that strict compound interest was never allowed on mere personal debts, particularly on such debts as the taxations, which were in fact illiquid claims until the judgment of the Court by which they were allowed.

To this it was answered,

1. That the method of charging interest on the heritable debt proposed by Mr. Tait would not be accumulation at all, which necessarily implied the forming all the interest, whether simple or upon interest, into one accumulated balance, itself bearing interest; and that this was truly intended by the Court, because Mr. Tait, retaining the debt for security merely, was not entitled to make any profit thereby, but was bound to restore it to the creditor, with all the benefit which he might have derived, had it been paid in due time; and,

2. That the only mode of charging interest on accounts-current was by means of striking an annual balance; and at any rate that it was incompetent for Mr. Tait now to object to this mode of charging interest, as it had been so charged in the original report, which was approved of by the Lord Ordinary, and afterwards by the Court, without any objection or reclaiming petition on this ground.

The Court repelled the objections, finally approved of the accountant's report as now amended, and decerned for the balance thereby brought out.

Lord Justice-Clerk.—I thought it neccessary to look back to the former proceedings as to the heritable debt, and to what passed on the Bench, of which I have notes, and I see that the same general argument was used, when the question of accumulation was before us, which is repeated now; but we were convinced that annual accumulation should be allowed in the manner which has been done by the accountant, and the grounds on which we proceeded were these: A debt was demanded by the creditor: The answer made was, I am ready to pay, with interest, if relieved of the obligation of warrandice. But then it was replied, that if effect was to be given to the plea of retention, all that the debtor could ask, was to retain for his security; he was not to profit by it, and convert the interest into a fund from which he might himself draw interest or profit, but was bound to accumulate it annually; and so we decided. It is a great deal too late to go back on this judgment now; but, even were it open, the same argument which prevailed formerly would prevail now. The next point is the application of this rule to the personal debt; and it

is rightly applied to this also, because Mr. Tait, as an agent, must be subject to the ordinary rule that an agent's accounts fall to be settled annually; and the accountant has merely proceeded on the supposition of this having been done. If Mr. Tait had been the creditor at these annual balances, he would have had the benefit of this principle; but, as the balance stood against him, he must bear the loss.

Lord Alloway.—Not having been in this Court when the judgments relative to the accumulation of the heritable debt were pronounced, I can only state my opinion as a doubt whether the words of these judgments sanction the mode of accumulation here adopted. I thought that it only meant to allow simple interest to be charged on each year's interest; for, supposing the creditor had adjudged in 1817, nothing more could have been awarded than the accumulated sum at the term of the adjudication, which would only have borne simple interest; and I do not see why he should be on a better footing now. On the same principle, I doubt the propriety of the accumulation on the accounts-current, which do not fall under the judgment of the Court allowing accumulation as to the heritable debt. I never saw compound interest allowed in any case, and I cannot conceive how it should be allowed on accounts-current, especially as the party believed these accounts to be settled, and as, in regard to a great part of the debt, it was impossible to say, till very lately, on which side the balance lay.

Lord Glenlee.—I did not imagine that we were to go into the principles on which the accumulation was formerly allowed on the heritable debt; for, looking at the words of the judgment, I think the accountant has put a correct interpretation upon it. And as to the accounts-current, when we approved of the report, we approved of the principle of accumulation adopted in it, and the party is now barred from objecting to it.

Lord Pitmilly concurred with Lords Justice-Clerk and Glenlee.

John Gibson, W. S.—W. Clark, W. S.—Agents.

R. Murray, Complainer.—*D. of F. Moncreiff—Fullerton.* No. 113.
W. Thomson, Respondent.—*Sol.-Gen. Hope—Henderson.*

Sheriff-Clerk's Fees—A. S. March 16. 1748—*Expenses.*—1.—Repetition ordered of overcharges of Sheriff-clerk's fees not sanctioned by A. S. March 16. 1748;—but,—2.—Expenses refused, in respect of the party not having applied in the first instance to the Sheriff, and of his having concluded for removal or censure of the Clerk, as to which he had no title.

Dec. 22. 1826.
2d Division.
F.

In a petition and complaint at the instance of Murray, a procurator before the Sheriff-court of Dumfries, against Thomson the Sheriff-clerk, for exacting other and higher fees than were authorized by the act of sederunt March 16. 1748, he objected to the following charges:—

1. A charge of 1s. as the fee of summary petitions, levied on the ground that such petitions must be considered as summonses; and 4s. as the dues of extracting the petition and warrant of service, which was never done in practice; and also a fee of 2d. to the clerks. The ground of objection was, that the act of sederunt only allowed for a 'petition' 6s. Scots; and that the only extracts allowed were those of 'decreets, acts, or commissions,' which, it was contended, did not include a warrant of service on a summary petition.

2. A charge on sequestrations, varying from 3s. 6d. to £1, according to the amount of the rent, in addition to the fee on the petition and of extract, founded on the allowance in the act of sederunt,—'For sequestration of a bankrupt tenant's effects, 'such a sum as shall be judged reasonable by the Sheriff, the 'highest not exceeding £12 Scots, the lowest not under £3 'Scots.' This was objected to, on the ground that the fee was only for the actual execution of the warrant to sequestrate.

3. A fee for registering protests, as being beyond that allowed by the act of sederunt, which was only 14s. 6d. Scots; and,

4. A charge for extracts, as being constantly for a greater number of pages than were warranted by the act of sederunt, which requires that each page should contain 36 lines at the rate of 13 words in the line.

The complaint having been remitted to Sir Thomas Kirkpatrick, Sheriff of Dumfries-shire, as mentioned ante, Vol. III. No. 290, (which see,) to report on these charges, he reported,

1. That summary petitions were not to be considered as summonses, but were chargeable only with 6d. as petitions;—that the warrant of service of such petitions was an 'act' on which the Sheriff-clerk was entitled to charge the fees of extract; and that the charge of 2d. was not sanctioned by the act of sederunt, but had been consented to be given to the clerks of the office for their writings, by an agreement to that effect signed by several of the procurators, and among others by the complainer.

2. That, according to the true construction of the act of sederunt, the term 'sequestration' in this provision meant the actual execution of the warrant; and that this fee should not be allowed on the mere passing of the warrant.

3. That the legal fee for registering a protest is 1s. 2½d.; and,

4. That the charges for extracts, in so far as the pages did not contain the number of words required by the act of sederunt, must be disallowed.

Sir Thomas further reported that on these principles the over-

charges for which the complainer was entitled to repetition amounted to £5 : 7 : 8½.

The Court unanimously approved of this report, and decerned in repetition in terms thereof, except as to the charge of 2d. to the clerks, where the extracts were actually written, from claiming repetition of which they found Murray barred personali exceptione; and under all the circumstances of Murray having complained to this Court, instead of applying in the first instance to the Sheriff,—having concluded for censure and removal from office, as to which he had no title,—their Lordships found that he was not entitled to expenses.

R. WELSH,—J. THORBURN,—Agents.

J. DYE and ATTORNEYS, Pursuers.—*Jameson.*
R. THORNTON, Defender.—*Buchanan—Ivory.*

No. 114.

THE Court altered an interlocutor of the Lord Ordinary sustaining an objection to the title to pursue, repelled the objection, and remitted to his Lordship to proceed accordingly

Dec. 22. 1826.
2D DIVISION.
Lord Mackenzie.
F.

DONALDSON and RAMSAY, W. S.—RAMSAY and IMRIE,—Agents.

A. ALEXANDER, Advocator.—*More.*
R. PINKERTON, Respondent.—*Napier.*

No. 115.

Schoolmaster—Parish.—Circumstances in which an heritor was found liable in payment of arrears of schoolmaster's salary for eleven years, notwithstanding his having paid salary for the same lands in another parish during that period, and for upwards of a century before.

THE lands of Boydstone, belonging to Alexander, originally formed part of the barony of Kilbride, and were admitted to have been situated, prior to 1650, in the parish of Kilbride; and they still appeared, in the cess-books of the county, as rated in that parish, in the cumulo valuation of the barony. By minutes of the presbytery of Irvine in 1649, it appeared that perambulators, appointed to consider how far the bounds of the several parishes in the presbytery were conveniently fixed, had reported that the lands of Mountfod, Boydstone, and Knockewart should be disjoined from Kilbride, and annexed to the neighbouring parish of Ardrossan. Some objection was stated to this proposal in regard to Boydstone by the then proprietor Lord Boyd, as to the deter-

Dec. 22. 1826.
2D DIVISION.
Lord Mackenzie.
M'K.

mination on which there was an entry in the minutes; but it was subsequently resolved by the presbytery that certain of the brethren 'should go east to plead before the Commissioners of 'Plantations for augmentation and demembration' of the three properties, Boydstone included. There was, however, no evidence produced of any decree of disjunction and annexation, in consequence, as Alexander alleged, of the destruction of the Teind Court records in 1700 by fire; but it was admitted that the lands of Mountfod and Knockewart were now considered as annexed, quoad omnia, to Ardrossan; and it appeared from the minutes of presbytery that from 1740 downwards the lands of Boydstone had been assessed, as in the parish of Ardrossan, for the several parochial burdens regarding the church, manse, &c. The lands of Boydstone were also stated to be in the parish of Ardrossan in Alexander's titles, commencing with a feu-charter in 1759. The schoolmaster's salary had likewise been constantly paid to Ardrossan from the date of the statute 1696; and road-money in the same way, with some slight exceptions, had also been paid in Ardrossan; while, on the other hand, the stipend effeiring to the lands of Boydstone had always been paid to Kilbride; and these lands were localled on, as in that parish, in two augmentations of stipend in later times.

In this situation Pinkerton, the respondent, was appointed schoolmaster of Ardrossan in 1809, and received from the heritors, as the rule for levying his salary, a roll of the parish, containing the valuations of the several lands in the parish, including Boydstone, but without the proportion of salary payable by each being set down. Agreeably to this roll, he continued to draw his salary till his resignation in 1820,—he himself calculating the amount of salary effeiring to the valuation of each, on the ground of Boydstone being truly in the parish; but he never received any payment for these lands from Alexander, who continued to pay the schoolmaster of Ardrossan, although Pinkerton drew the salary from other lands of Alexander admitted to be in Kilbride. It was alleged, however, that demands had been made for payment of the salary from Boydstone; but this was denied, and there was no evidence as to how the fact really stood.

After Pinkerton had given up the office in 1820, he raised the present action before the Sheriff of Ayrshire, concluding for payment of about £10, as the arrears of salary for the lands of Boydstone since 1809, the period of his appointment as schoolmaster, together with the double penalty authorized by the act 1696, confirmed by the 43d Geo. III. c. 54. The Sheriff having

decerned for payment of the salary and penalty, Alexander brought an advocation, in which he contended,

1. That there was sufficient evidence of his lands having been disjoined from Kilbride, and annexed to Ardrossan, quoad omnia.

2. That it was incompetent for the schoolmaster to bring an action of this kind, which went to invert the state of possession enjoyed for upwards of a century, particularly without calling the parties interested belonging to the parish of Ardrossan.

3. That having, during the period for which the arrears were claimed, paid salary for the lands of Boydstone to the schoolmaster of Ardrossan, bonâ fide believing that they lay in that parish, he could not be called on now to repeat; and that Pinkerton was barred personali exceptione from claiming repetition, not having proved that he had made any demand during the period of his incumbency, notwithstanding his knowledge of the payments having been made in the parish of Ardrossan; and,

4. That at all events, he could not be subjected in the penalty, having been, as he alleged, in perfect bonâ fide, and the certificate of valuation furnished to the schoolmaster not being a regular stent-roll made up by a meeting of heritors, in terms of the act 1696, and not assessing each heritor in the sum of salary to be paid by him, but merely ascertaining their respective valuations.

The Lord Ordinary advocated the cause, found 'the advocator 'liable in the sum of school salary libelled in the original summons simply, but not to the double thereof,'—and found no expenses due. To this interlocutor his Lordship added the following note:—'Besides the plea in equity against the penal claim 'for the double of the proportion of school salary, there is in this 'case a plea under the strict words of the statute 1696 itself; for 'it does not appear that the proportion of salary payable by the 'defender was ever stented and laid on by the heritors in form, as 'the statute requires, which seems necessary before the penalty 'of double payment can be insisted for in terms of the statute. 'It does not seem possible for the respondent, especially while 'pleading himself the strict words of the statute against the advocator's plea of bona fides, to claim a penalty by a literal construction of that very statute. The lands, however, seem to be 'in the parish of Kilbride, except quoad sacra. In particular, 'the Lord Ordinary sees no evidence of payment of any stipend, 'either old stipend or augmented stipend, in Ardrossan; and it 'does not seem to the Lord Ordinary that payment of schoolmaster's salary in a wrong parish, though made bonâ fide, affords a defence against payment in a right one.'

Pinkerton acquiesced in the Lord Ordinary's interlocutor in so far as it refused his demand for the penalty, but reclaimed in so far as he was not allowed his expenses; and Alexander having also reclaimed on the merits, the Court allowed Pinkerton a diligence for recovery of certain documents in further support of his claim. Under this diligence were recovered certain minutes of the heritors of Kilbride, and other papers, the import of which was allowed to be stated at the Bar, without printing the documents themselves, in respect of Pinkerton being on the poor's roll. From these it appeared, that at a meeting of the heritors of Kilbride, at which Alexander was present, held on the 3d January 1805, during the incumbency of Pinkerton's predecessor, one of their number had been appointed to draw up a stent-roll of the parish under the act of Parliament 43d Geo. III. c. 54, for the express purpose of forming the rule for levying the schoolmaster's salary; and that, on his report, a subsequent meeting had approved of and adopted the stent-roll, which had been delivered to Pinkerton at his appointment, signed by the preses of the meeting, and in virtue of which he had always levied his salary. It further appeared, that in 1816 the heritors had raised a summons against Alexander for payment of his share of the expense of building a manse &c., in respect of his lands of Boydstone, on the ground that they were situated in Kilbride, and that he had paid these dues in consequence; and also, that in a petition presented by him the same year to the Commissioners of Supply for division of a cumulo valuation, he stated his lands of Boydstone to be in Kilbride, and that they had been annexed to Ardrossan quoad sacra.

The Court unanimously adhered to the Lord Ordinary's interlocutor on the merits, and altered as to expenses, in which they found Alexander liable.

Lord Glenlee.—This action is brought on the statute 1696, which is imperative that the heritors are to stent themselves. If the stent-roll made up by them be complete, the schoolmaster does not require to go the Sheriff at all;—he may at once charge for payment. If a regular stent-roll be made up by the heritors, he is entitled to demand payment under it; and if the heritors fail to make it up, his remedy is by application to the Commissioners of Supply. Now it is plain that a regular stent-roll was made up here; a previous meeting of heritors remitted to Mr. Hunter to draw it up, and a second meeting approved of it; and though each man's share is not specified, yet it mentions according to what valuation each is to pay. I conceive, therefore, that it is perfectly regular under the statute; and this being the case, Mr. Alexander must pay the schoolmaster in the mean time, and get redress the best way he can.

LORD PITMILLY concurred.

LORD ALLOWAY.—Till I heard the documents now read from the Bar, I thought that we must have gone on the general principle; in which case the question would have been, What evidence is there that the lands of Boydstone were detached from Kilbride, of which it is admitted they were once a part? And as to this, I think there is no evidence of a disjunction quoad civilia; so that, even on the general principle, I would have held Alexander liable. But now that documents are produced, showing that a stent-roll was prepared at a meeting of heritors, at which he was present, I cannot entertain a doubt on the subject. The heritors are not obliged to cast up the sum payable by each. It is quite enough, if they fix the valuation according to which it is to be paid.

LORD JUSTICE-CLERK.—I entirely concur. The documents now produced remove all possibility of doubt. The schoolmaster has been all along in bona fide, and his demand ought to have been complied with. The stent-roll was made up according to the cess-roll of the county; and Mr. Alexander himself, in his petition to the county in 1816, states the lands of Boydstone to be annexed to Ardrossan only quoad sacra.

W. PATRICK, W. S.—R. URQUHART,—Agents.

No. 116.

T. M'KENZIE, Advocator.—*Alison.*
JANE SMITH, Respondent.—*Whigham.*

Proof—Semiplena Probatio—Bastard.—Circumstances under which it was held, that the payment of a sum of money by a married man to a woman who charged him with being the father of her bastard child, in consideration of receiving from her a declaration that he was not so, constituted a semiplena probatio, and entitled her to her oath in supplement.

Dec. 23. 1826.

1ST DIVISION. Lord Eldin. D.

THE respondent Jane Smith brought an action before the Justices of Peace for the county of Haddington against M'Kenzie, alleging that he was the father of her bastard child, and concluding for aliment. In support of this action she stated, that in the end of March 1820 she called at a druggist's shop in Edinburgh, kept by the father of M'Kenzie, and in which he was then an assistant, to get some medicine;—that M'Kenzie, after giving her some, which was found not to have been beneficial, repeatedly came to see her at her own house, and that in this way they had become acquainted;—that, under the pretence that he meant to teach her the art of midwifery, he carried her to Burntsfield Links, and thereafter to the King's Park, where they had carnal connexion in the open fields; but she did not allege that any such intercourse had taken place in her own house;—that she then went to Inverness, where the child was born in December 1820;

and in the summer of the following year she came to Edinburgh, and went to the same shop, where she found M'Kenzie and a Dr. Young;—that she then charged M'Kenzie with being the father of the child, and he having given no satisfaction, she went to his private house in the country, where he paid her twenty shillings, and afterwards £20, on account of the claim which she had made against him.

In defence, M'Kenzie denied that he was the father of the child, or that he had ever seen the woman till she called with the child in the summer of 1821 at the shop, when she did not allege that he was the father;—that, on the contrary, it appeared that she had employed a writer from Dingwall, who happened to be in Edinburgh, to write a letter to Dr. Young, charging him with being the father of the child; and that he having resisted her demands, and having learned that M'Kenzie was a married man, she, with the view of compelling him to give her money, alleged that he, and not Dr. Young, was the father;—that in order to purchase the peace of himself and of his family, he agreed to give her £20, on condition that she would subscribe the following letter, which she accordingly did with her mark, in presence of witnesses:—'I am sorry that, through mistake, I happened to charge you with being the father of an illegitimate child brought forth by me on or about the 24th of December last. I therefore hereby declare, for the satisfaction of you and your friends, that you are not the father of the said child.'

She admitted that this letter was written by the agent she had instructed to write to Dr. Young—that he subscribed it as a witness—that the money was thereupon paid—a receipt given by that agent—and that the greater part of it had been received by her from him; but she alleged that he was a person who had volunteered his services—that she was not previously acquainted with him—that the letter had not been explained to her—that she had understood that the money had been paid in name of aliment—and that being now exhausted, she was entitled to an additional sum. M'Kenzie, however, offered to prove that the agent was duly authorized by her, and that the letter had been read and fully explained to her. The Justices, without allowing any additional proof, and being chiefly influenced by the payments made by M'Kenzie, allowed Smith to depone in supplement.

Of this judgment M'Kenzie brought an advocation, and contended that as the only circumstance on which the parties were agreed was the payment of the money, and as it was established by Smith's own letter that it had been paid merely to buy his

peace, and not as recognising the validity of the claim, it not only was not sufficient to constitute a semiplena probatio, but was a complete contradiction of her allegation.

To this it was answered, That if M'Kenzie had been satisfied that he was innocent of the charge against him, he would never have paid such a sum for the purpose alleged, or taken a discharge of the claim against him as father of the child; that in truth it was paid as an acknowledgment of the fact, and the letter had been framed under his own inspection; that he did not deny that he had previously paid her twenty shillings at his country-house, or that he had then alleged that he was not the father; and she contended that even although she had entered into such a transaction, it was not legally binding.

The Lord Ordinary advocated the cause, and assoilzied M'Kenzie; but the Court altered, remitted simpliciter, and found expenses due.

Lord Gillies.—I think the interlocutor of the Justices quite right. It is not denied that M'Kenzie was accused in the shop of being the father. The charge against Young was made under mistake by a person who volunteered his services as agent, and she afterwards explained that it was M'Kenzie, and not Young, whom she meant. Accordingly it is M'Kenzie who transacts with her, and pays the £20. In my opinion, the disclamation obtained from her affords strong evidence that he was the father of the child, and that he procured it, in order to avoid any investigation into the truth of the matter.

Lord President.—If, as M'Kenzie alleges, he was acting under the influence of securing the peace of his family, he ought to have followed Dr. Young's example, by resisting her demands. He seems, however, to have been satisfied that she had fixed on the right man.

Lord Craigie.—Compromises of threatened claims should not be regarded, either on one side or the other, in determining as to the truth of an allegation; but it is not alleged that the payment of the twenty shillings was of this description; and this circumstance is very strong against M'Kenzie. It is also somewhat extraordinary that M'Kenzie should pay anything to the woman, after he knew that she had charged Dr. Young with being the father. This looks extremely like conscious guilt; but I think there should be a further investigation, and that both he and Dr. Young ought to be examined.

P. Hewat, W. S.—Murray and Inglis, W. S.—Agents.

No. 117. A. Ross, (Trustee on D. Lennox's Sequestrated Estate,) Suspender.—*Sol.-Gen. Hope—Rutherfurd—Robertson.*
Equitable Loan Company of Scotland, Chargers.—*D. of F. Moncreiff—Greenshields.*

Pawnbrokers' Act—Process.—1.—The Court passed a bill of suspension and interdict, presented by the trustee on a bankrupt estate, against the sale of goods impledged by the bankrupt with the view of defrauding his creditors,—the money lent on them having been advanced, although on tickets of £10 each, in sums to a much larger amount on single pledges.—2.—Held incompetent in the Bill-Chamber to grant warrant for inspection of goods impledged.

Dec. 23. 1826.

2d Division. Bill-Chamber. Lord Newton. M'K.

Lennox, a merchant or shopkeeper in Perth, having applied, under the name of Robert Scott, to the Equitable Loan Company of Scotland, an extensive pawnbroking establishment in Edinburgh,* for loans of money on the security of goods to be deposited with them in pawn, they made advances to him to the extent of about £1750 under that and several other fictitious names adopted in the course of their transactions. So far as appeared, the company were not aware of what his real name was, or that the name of Scott, in which he had originally applied, was feigned; but they knew that all the other names, except that of Scott, were adopted for the purpose of concealment. The advances were made on security of large assortments of haberdashery goods, &c. transmitted to the company, (on some occasions, through indirect channels, and without the original packages, as obtained by him from the manufacturer, having been opened); and although the amount lent was divided into numerous sums of £10 each, with corresponding tickets, to bring the transaction under the Pawnbrokers' Act, yet several of these tickets were frequently given on one unbroken piece of cloth or single package; so that £40 or £50, or even in some instances £150 and upwards, were advanced on a single unbroken package or uncut piece of cloth.

Lennox, having become bankrupt, endeavoured to conceal from his creditors the circumstance of his possessing these goods in pawn with the Equitable Company. The company, however, having discovered that he was the person to whom they had made advances under the name of Scott, gave information to his creditors, who immediately took out a sequestration against him, in which Ross was appointed trustee. Shortly thereafter Ross demanded access

* It was stated by the counsel for the company, that in a single month 11,254 pledges had been received, and 8456 redeemed; and that, in the course of the last twelve months, £40,000 had been advanced on pledges, of which £39,000 had been redeemed.

to the impledged goods belonging to the bankrupt, with the view of ascertaining what it would be advisable on the part of the creditors to redeem. This, however, was resisted by the company, who further intimated an intention to sell the goods. Ross then presented a bill of suspension and interdict, praying for authority to inspect the goods, and to have the company prohibited from proceeding with the sale, on the ground,

1. That this mode of making advances was not warranted by the Pawnbrokers' Act, which was intended not to sanction the extensive species of traffic which had been carried on, but to enable poor persons to obtain advances to an extent not exceeding £10 on any single pledge, and therefore that the company had no right to proceed to a sale, which they could only do in virtue of that act; and,

2. That at any rate they were not entitled to refuse access, for the purpose of inspection, to any person who had pledged goods with them.

The Lord Ordinary refused the bill; but the Court unanimously altered, and remitted to pass it, and grant the interdict, reserving to Ross to apply to the Judge Ordinary, or to the Lord Ordinary, on the expede letters coming before him, for warrant to inspect the goods, which their Lordships held it incompetent to grant in the Bill-Chamber.

T. Johnstone,—W. Duncan, W. S.—Agents.

W. Peter, Pursuer.—*Jeffrey—Russell.* No. 118.
W. Mitchell and W. Weir, Defenders.—*M'Neill—J. Henderson Jun.*

Process—6, Geo. IV. c. 120.—Circumstances in which a document not produced with the summons was held not to be in the pursuer's 'custody, or within his 'power,' under the meaning of the above statute.

In a summons raised by Peter against Mitchell and Weir, he founded on a bill of exchange which was not produced with the summons. Defences having been returned, he craved a diligence, under which he recovered this bill out of the hands of a person who had at one time been his agent in a relative process before the Sheriff Court of Dumbarton. The defenders were then allowed to give in additional defences; and having done so, they craved the expense of their original defences, on the ground that Peter ought to have produced the bill with his summons. This was opposed by Peter, who contended that the bill was not, in terms of the act of Parliament, 'in his custody, or within his

Dec. 23. 1826.
2d Division.
Ld. Cringletie.

'power;' and he offered to prove that, before bringing his action, he had applied to his former agent, through the person who was now his agent at Dumbarton, for this bill, but without success; and consequently that he could not recover it except by means of a diligence when his action came into Court.

The Lord Ordinary, however, awarded to the defenders the expenses of the original defences, and allowed interim decree to go out for them. Peter then reclaimed, and produced a letter which supported the averment made before the Lord Ordinary, that he had applied unsuccessfully for this bill before raising the action; whereupon the Court altered his Lordship's interlocutor, and repelled the claim for expenses.

LORD ALLOWAY.—If it had been shown to the Lord Ordinary that the document was not within the pursuer's power, then the interlocutor would be wrong. But, till the letter now read at the bar was produced, there was no evidence of this; and, till proved to be otherwise, it must be held that a document in the hands of an agent is within the power of the client. Besides, the pursuer might have applied to the Sheriff for a warrant to recover the bill, and he ought to have done so before raising his summons, whereby the expense of the diligence would have been rendered unnecessary. In this view, therefore, I think the Lord Ordinary's interlocutor is right.

LORD PITMILLY.—I am very unwilling to interfere with the Lord Ordinary in matters of this kind, but I do not think that his Lordship's interlocutor is well founded. An application to the Sheriff would be like an action of exhibition; and I think it a much better way, and the least expensive, to raise the summons first, and then get a diligence. It was only under the diligence that the bill was recovered; and the legitimate inference is, that it could not be had without it. The Act therefore does not apply here.

LORD JUSTICE-CLERK.—I likewise entertain the utmost reluctance to interfere with the Lord Ordinary; but when a question is raised on the construction of the Statute, which our Act of Sederunt cannot affect or alter, it becomes important. We must undoubtedly give due effect to the Act of Parliament, and ought always to enforce the penalties in it when incurred. But, looking to the Act, I do not think it means that a party, before bringing his action, must raise a summary process in the Inferior Court to recover the documents on which he is to found, and thus perhaps lead to a long litigation, in the course of which the document, if a bill, may prescribe before he can bring his action. The meaning of the Statute seems merely to be, that a party must produce with his summons all documents in his custody, or which he can obtain without legal compulsitor; and in this case I do not think that the bill was in the pursuer's 'custody, 'or within his power,' under the meaning of the Statute. If no at-

tempt had been made to get the bill before bringing the action, the penalty might perhaps have been enforced; but we see that there had been such an application, which was unsuccessful; and although the evidence of that was not before the Lord Ordinary, that was owing to his Lordship not allowing any time to obtain the letter now produced.

J. CRAWFORD, W. S.—J. G. HOPKIRK, W. S.—CAMPBELL and MACDOWALL,—Agents.

ACT OF SEDERUNT

As to furnishing the Lords Ordinary with a copy of the closed Record.

BY this act it is declared,—

I.—That the party enrolling a cause in the debate roll of any of the Lords Ordinary, for debate upon a closed record, shall, at the time of enrolment, deliver to the clerk who enrols the cause a written or printed copy of the closed record. Jan. 16. 1827. Copy of Record to be delivered to clerk enrolling the cause, otherwise not to enrol.

II.—That if he fail to do so, the clerk shall not enrol the cause.

III.—That a party who has already enrolled a cause, but which has not been yet debated, shall deliver a written or printed copy of the closed record to the clerk of the Lord Ordinary within 14 days from the date hereof; and, If cause already enrolled, a copy to be given to clerk of the L. O.

IV.—That if he fail to do so, the cause shall be struck out of the debate roll.

W. POLLOCK, Advocator.—*Robertson—W. Bell.*
J. TURNBULL, Respondent.—*Sol.-Gen. Hope—L'Amy.*

No. 119.

Property—Burgh Royal—Title to Pursue.—Held,—1.—That a singular successor of a feu of which the Magistrates of Edinburgh were superiors, could not be affected by conditions contained in acts of Council, but which were not introduced into the titles, nor referred to;—and,—2.—That the City Chamberlain having been called as a party to a process before the Dean of Guild for authority to build, was entitled to make appearance, and found on these acts of Council.

Jan. 16. 1827.

1ST DIVISION. Lord Meadowbank. D.

ON the 14th of February 1781, the Magistrates of Edinburgh passed an act of Council, declaring 'that no feu shall be granted 'in the extended royalty for houses above three stories high, ex- 'clusive of the garret and sunk stories: Also, that, before grant- 'ing charters, the feuars be obliged to lodge, with one of the City 'clerks, plans and elevations of the buildings they intend to erect, 'to be submitted to the inspection of the Council; and if they are 'approved of by them, these plans and elevations must be lodged 'in the City's charter-house, in perpetuam rei memoriam, within

'eight days after the charter is granted, and said deposit to be 'minuted first Council day thereafter.' Then, after some regulations as to the meuse lanes &c., the act of Council declared that reference should be made to it in all the future charters to be granted to feuars in the extended royalty.

On the 15th of September 1784 another act of Council was passed, in which, after narrating that the builders had disregarded the former one, it was enacted, that 'the Town's overseer shall 'be directed, when he sees a foundation digging out, to require 'from the builder a sight of the elevation, with an extract of the 'act of Council approving thereof; and upon refusing or delaying 'so to do, to apply to the Dean of Guild to stop the building till 'such time as the elevation, and extract of the act approving 'thereof, are produced;' and it was further appointed that 'a 'printed copy of this act be delivered along with each act of 'Council granting a feu in the extended royalty, that none pre-'tend ignorance.'

Again, on the 29th of June 1785, another act of Council was passed, declaring,

'1. That when any application is given in to the Council for a 'feu, the same is to be remitted to a committee; but the com-'mittee is to make no report thereupon, nor is the feu to be granted, 'until such time as a plan and elevation of the intended building, 'signed by the person applying, be given in to the committee, 'and approved of by them.

'2. That no feu shall be granted in the principal streets in the 'extended royalty for houses above three stories high, exclusive 'of the garret and sunk stories; and that the whole height of the 'front walls from the floor of the sunk story shall not exceed 'forty-eight feet.'

It was then declared that transgressors should be liable in a certain penalty, besides being compelled to observe the act; and,

'Lastly, That no proposal for a feu be agreed to, unless it con-'tain a reference to this act, and an obligation on the proposer 'to observe and fulfil the articles before enumerated; and that 'every such proposal shall be written on a paper to be annexed 'to a printed copy hereof; and they appointed this act of 'Council to be printed and published, that none may pretend ig-'norance.'

On the 10th of November of the same year, the Magistrates, by missive, agreed to feu to William Veitch, builder, a piece of ground on the north side of George street. Before any title was granted, he erected a house upon it, three stories high, which was purchased by Michael Riddell, Esq.; and on the 22d of November

1786 the Magistrates, with the concurrence of Veitch, granted a feu-charter to Mr. Riddell. By this deed they conveyed to him the piece of ground for payment of a certain feu-duty, to be held of the Magistrates 'as superiors in time coming; without 'prejudice nevertheless to the said Michael Riddell or his fore-'saids to grant securities upon the aforesaid property, or to ex-'ercise any other act of ownership which may not be inconsistent 'with the manner of holding hereby prescribed.' No limitation whatever was imposed as to the height to which houses might be built on the ground, and no reference was made either to the acts of Council, or to the plan of the town. On this charter sasine was immediately taken and recorded.

After passing through several hands, Mr. Pollock acquired right to the property by purchase; and being desirous to put an additional or fourth flat upon the house, and to make shops of the lower part of it, he presented a petition to the Dean of Guild, 'stating his intention to turn the dining-room and area flats into 'shops, and to take down the back wall, and widen the tenement 'to the extent of 20 feet, so as to build upon part of his back 'area, and carry the wall the height of the tenement, and to take 'off the roof, and to build an additional flat to the tenement, and 'to open up the cellars in front, and to convert them into wine 'vaults,'—and praying for the authority of the Court to make those alterations.

After visiting the premises, the Dean of Guild 'ordered Mr. 'Pollock to call the City Chamberlain as a party to this process,' which he accordingly did, and in consequence the respondent Mr. Turnbull entered appearance. Mr. Turnbull then objected,

1. That the proposal to raise the tenement, by building an additional or fourth flat, was contrary to the acts of Council; and,

2. That the statute 1698, c. 8, required that houses of the proposed height should have walls of a greater thickness than those of the house in question.

To this it was answered,

1. That as Mr. Pollock was a singular successor, he could only be bound by the conditions appearing in the titles; and that as the provisions of the acts of Council were neither inserted in them, nor referred to, they could have no effect against him.

2. That he was willing to build in terms of the above statute; and,

3. That Mr. Turnbull had no title or interest to resist the prayer of the petition.

At this stage of the proceeding, Mr. Pollock lodged a minute,

in which he prayed to be allowed to take down the house entirely, and to rebuild it of the above height. The Dean of Guild and his Council then pronounced this interlocutor: 'Find that the 'Lord Provost, Magistrates, and Council of Edinburgh, the su- 'periors of the ground on which George street is built, did, by 'an act of Council, of date the 14th of February 1781, enact that 'no feus should be granted in the extended royalty for houses 'above three stories high, exclusive of the garret and sunk storey; 'and by another act of Council, of date 15th September 1784, 'did enact that no feuar should begin to build till the elevation 'of his intended building should be approved of by the Council; 'and by a third act of Council, bearing date the 29th of June '1785, did enact that no feus should be granted in the principal 'streets of the extended royalty for houses above three stories, 'exclusive of the garret and sunk stories: Find that when the 'pursuer's author obtained a charter from the superiors to the 'ground on which the pursuer's house stands, the house was then 'built, and had been erected in terms of the foresaid acts of 'Council, that is, not exceeding three stories in height, exclusive 'of the garret and sunk stories; and therefore that there was 'no necessity to insert in the charter any restriction in respect to 'the height of the house: Find that those acts of Council, never 'having been recalled, are binding on the pursuer, in the same 'manner as they were binding on the original feuars; and that 'the chamberlain of the superiors having been called as a defend- 'er, has a title to oppose the application now made for permis- 'sion to erect on the said piece of ground a new tenement, con- 'sisting of four stories, exclusive of the garret and sunk stories; 'and in respect the chamberlain opposes the application, there- 'fore refuse the same, in so far as the petitioner asks permission 'to have a fourth storey; but, quoad ultra, grant the prayer of 'the petition, and allow the petitioner to take down and rebuild 'the tenement accordingly, conform to the plan No. 2. of pro- 'cess, under the above exception, and also on condition that 'no part of the cellars go beyond the crib-stone of the foot pave- 'ment; and allow an interim warrant to this effect to be ex- 'tracted.

'*Note.*—The cases of Campbell against Lindsay, 17th of Feb- 'ruary 1803, and Reid and Burnett against Neil, 24th of May 1808, 'decided by the Court of Session, warrant, as appears to the 'Court, the above interlocutor.'

Of this judgment Mr. Pollock brought an advocation, in which the Lord Ordinary, after closing the record, and advising Cases, remitted 'to the Dean of Guild with instructions to grant war-

'rant for completing the building in question agreeably to the 'plan in process, and as craved in the advocator's minute in the 'Inferior Court.'

The Lord Ordinary delivered his opinion in this note:—

'1. The Lord Ordinary is of opinion that the City Chamber- 'lain has no right to appear in this process, to the effect of en- 'forcing performance of the alleged acts of Council founded on.

'2. The acts of Council themselves are nothing more, either in 'words or substance, than a declaration of those stipulations which 'it was proper for the Magistrates, as superiors, to impose upon 'the feu-rights of their vassals, and do of themselves afford evi- 'dence of the understanding of all parties, that unless the feu- 'rights were qualified by the mention of those limitations, they 'would not be effectual.

'3. Not being imposed in the charter granted by the Magis- 'trates to the authors of the advocator, the alleged restrictions 'cannot be enforced against him, a singular successor in the pro- 'perty. The Magistrates, as superiors of the property on which 'the tenement in question is erected, are in no other situation 'than any other superiors, and have no right to impose limita- 'tions on subjects feued out by them in a manner different from 'others.

'That the Dean of Guild may have a right to prevent a breach 'of regulations of police respecting the buildings erected within 'his jurisdiction, may be very true; but in that case the proper 'officer to enforce observance of such regulations is the procura- 'tor-fiscal of the Dean of Guild Court; and, in the second place, 'it must be shown, which it has not been, that a regulation against 'adding a fourth storey to the tenements in the New Town actually 'exists, of which the Lord Ordinary has seen no evidence, as 'the acts of Council founded on cannot, in his opinion, be so in- 'terpreted, applying, as they do, altogether to limitations to be 'imposed in feu-charters; but which has not been done in this 'case, or, as far as appears, in any other.'

Mr. Turnbull having reclaimed, the Court adhered on the merits, and found that as Mr. Turnbull had been called as a party, he had a title to appear and object.

Lord Balgray.—There is no objection to the shape of the process; because, although Mr. Pollock originally intended not to take down the building entirely, yet it often happens that it is necessary to make more extended alterations than what were intended; and therefore, amendments to this effect are, and often must be made. With regard to the objection to Mr. Turnbull's title, I do not think that

in this case it is well founded. He was called by an order of the Court, which was acquiesced in by Mr. Pollock; and I therefore think that he was entitled to appear, and to oppose the petition, as the mandatory of the Town Council. In relation to the merits, it is true that the object of the acts of Council, was to prevent houses being built above a certain height, and it was intended that this prohibition should be inserted in the charters granted to feuars; but this was not introduced into the charter in question; and as Mr. Pollock is a singular successor, he cannot be affected by anything that does not appear in the titles.

LORD CRAIGIE.—If the interlocutor is adhered to, this will be the first decision establishing that feuars may build in this town as they please, which would be in opposition to the cases of Campbell and Reid. These two cases establish that these acts of Council must be regarded as essential conditions of all the charters granted by the Magistrates. Perhaps the plan of the town might have been better than it is, and the houses erected in some parts of it in better taste; but, to attain that object, we cannot break through established rules, more especially in relation to the principal streets. If we do not enforce these conditions, any one may build as he pleases, so that you may have a house of four or five stories, and another of one or two beside it, and thus the greatest irregularity will be introduced.

LORDS PRESIDENT and GILLIES concurred in the opinion of Lord Balgray; and the former observed, that if Mr. Turnbull had not been called, he would have doubted extremely whether he had any title to appear.

Advocator's Authorities.—Gibson, May 4. 1814 (2. Dow, 391); Gordon, Feb. 1818, (6. Dow, 87); Walker, March 11. 1825, (ante, Vol. III. No. 437.)

Respondent's Authorities.—Campbell, Feb. 17. 1803, (No. 13. App. Burgh Royal); Reid, May 24. 1808, (No. 21. App. Burgh Royal); Dirom, June 5. 1812, (see note to Young and Company, Nov. 17. 1814, (F. C.)

W. POLLOCK,—MACRITCHIES, BAYLEY, and HENDERSON, W. S.—Agents.

No. 120.

J. and M. MARSTON, Pursuers.—*G. Bell.*
W. UNDERWOOD, Defender.—*Henderson.*

Adjudication—Tack—Competition.—A party having acquired right as principal tacksman to a long lease, and his name having been entered in the rental-book of the proprietor, and having subset part of the subject, and thereafter obtained a renunciation and reconveyance of the sublease, held preferable to a creditor adjudging in virtue of a bond and assignation in security granted subsequently by the subtenant.

Jan. 16. 1827.

1ST DIVISION. Lord Eldin. H.

ANDREW MUNDELL having obtained a tack, in 1730, of part of the estate of Lockerby for 21 times fourscore years, his heir and successor conveyed it to the defender Underwood, who was accordingly entered in the rental-book of the proprietor as prin-

cipal lessee. Thereafter Underwood subset one half of the subject to Alexander Linton, who conveyed it to one Bell, by whom possession was taken. Linton thereafter acquired right to it by a retrocession from Bell, and then reconveyed it in October 1818 to Underwood. In August 1820 Linton granted a bond and assignation in favour of the pursuers Marstons, by which he assigned to them, inter alia, the above subject in security of £115; and in November thereafter, having been incarcerated for debt, he executed a disposition omnium bonorum in favour of trustees for behoof of his creditors. A question having arisen between these trustees and Underwood as to the right to the above part of the subject, Lord Pitmilly found, 'that Linton having been 'only a subtacksman, the reconveyance of his right to the prin-'cipal tacksman did not require to be intimated to the proprietor 'of Lockerby; that the defenders, whose alleged title to the 'subjects in question consists of a disposition omnium bonorum 'by Alexander Linton, granted in November 1820, have no right 'to these subjects whatever, in respect Linton was divested of 'them by the conveyance in October 1818 in favour of the pur-'suer; and that the disposition omnium bonorum did not com-'prehend, and was plainly not intended to comprehend these 'subjects;' and this interlocutor was confirmed by the Court. (See ante, Vol. III. No. 241.)

The pursuers Marstons having thereafter raised a summons of adjudication, founded on their bond, in which they included the above subject, and Underwood having opposed it to this extent, the Lord Ordinary, 'in respect that the conveyance to part 'of the property in question in favour of William Underwood 'is dated prior to the deed in favour of the pursuers, found that 'the subjects referred to in the conveyance in favour of the said 'William Underwood must be deleted from the summons of ad-'judication;' and the Court adhered.

W. M. Little,—W. Martin,—Agents.

J. Smith, Pursuer.—*J. M. Bell.*
J. Hart and Others, Defenders.—*Jameson.*

No. 121.

Cessio—Process—6. Geo. IV. c. 120.—A judgment granting the benefit of cessio pronounced in absence of the creditors, where all the procedure had been regular, held not subject to review.

Jan. 16. 1827.

2d Division. F.

A summons of cessio bonorum, raised by Smith against his creditors, after having been taken out to see, was put out in the regulation roll of the week preceding the Christmas recess; and having stood there for four days, was called on Thursday the

21st December, when great avizandum was made. It was then enrolled in the Inner-House roll of the next day; and on the usual statement of the case at the bar, a judgment was pronounced granting the benefit of cessio, without appearance having been made on the part of any of the creditors. Against this judgment certain of the creditors presented a reclaiming note, to the competency of which it was objected, that under the late Judicature Act the Court had no power to review their own judgments.

To this it was answered, That the provision to that effect in the act of Parliament followed the various regulations relative to causes in which appearance had been made, and consequently had reference only to judgments pronounced causâ cognitâ; that the case of a judgment in absence in the Inner-House seemed not to have been foreseen or provided for; and that it was incompetent to extend to such cases provisions obviously intended for a totally different class,—and this the more especially, as bankrupts were allowed to reclaim against judgments refusing them the benefit of cessio.

The Court unanimously refused the reclaiming note as incompetent.

Lord Justice-Clerk.—I confess that whatever may be the hardship on the creditors, it appears to me that the bankrupt is protected by the act of Parliament. The absence of the creditors arose from their own neglect. There was no undue precipitancy; the case stood for four days in the regulation roll, and the not making appearance when the cessio was pleaded, was entirely their own fault. If we are to entertain this note, it will just come to this, that where every thing has been regularly done, we may be called on to open up the judgment by any creditor who does not choose to appear. The act of Parliament expressly mentions 'all causes,' and I cannot apply a different rule to this from what we must do to other cases. As to the bankrupt reclaiming from a judgment refusing the cessio, that arises from the refusal always bearing to be 'in hoc statu;' so that it is still a depending process.

Lord Glenlee.—It may possibly be, that a case of this kind was not in view of the persons who framed this statute, but, in construing an act of the Legislature, we must take the true meaning of the words, which extend to all cases.

Lord Pitmilly concurred.

Lord Alloway.—I likewise concur in this particular case; but I reserve my opinion as to a case where there is any real defect in the process.

To the propriety of this qualification the other Judges appeared to agree.

R. Dunlop, W. S.—J. Gemmell,—Agents.

D. CLEGHORN, W. S. (THOMAS KYLE's Trustee.)—*Murray—Walker.*
R. GORDON and Others, (DAVID KYLE's Trustees.)—*Cockburn—A. M'Neill.*

No. 122.

Trust.—A creditor of a trust-estate, under a voluntary trust, having succeeded in a litigation with the creditors of the truster in establishing his claim against the trust-estate; held that, in accounting with him, the trustee was not entitled to deduct the expenses of the litigation.

Jan. 16. 1827.

2D DIVISION. Lords Pitmilly and Mackenzie. M'K.

THOMAS KYLE was proprietor of the estate of Fens, under burden of a liferent enjoyed by his father David Kyle in right of courtesy. Thomas having fallen into embarrassments, executed a trust-deed for behoof of his creditors in favour of trustees. To enable them to sell the property, David Kyle entered into a transaction with them, by which he agreed to renounce his liferent in consideration of an annuity of £120 per annum, and to allow a few acres belonging in property to himself to be sold along with the estate of Fens. The estate was accordingly sold, and the price effeiring to David Kyle's acres amounted to £573. This sum not having been paid to David Kyle, and the annuity having been allowed to fall into arrear, an action was raised by Gordon &c., (to whom David Kyle had conveyed all his property in trust,) against the trustees of Thomas, for payment of the price of the acres belonging to David, and of the arrears of annuity. In this action they were opposed by Thomas Kyle's trustees, under authority of resolutions of his creditors; but they ultimately obtained decree, with expenses. Thereafter Mr. Cleghorn, having been appointed sole trustee on the estate of Thomas, raised a multiplepoinding as to the disposal of the trust-funds in his hands, in which David's trustees lodged a claim for the amount so decerned for. In the condescendence of funds lodged by Mr. Cleghorn, he deducted both the expenses incurred by Thomas Kyle's estate in the litigation, and those awarded and paid to David's trustees. To this it was objected, that as they were not creditors of Thomas Kyle under the trust, but creditors of the trust-estate itself, or, in other words, of the creditors on that estate, by virtue of the transaction, Mr. Cleghorn was not entitled, in a question with them, to deduct the expenses incurred on either side from the fund in medio. Lord Pitmilly found, 'That the 'pursuer, the trustee for the creditors of Thomas Kyle, in stating 'the amount of trust-funds in account with the respondents, the 'trustees of David Kyle, is not entitled to claim deduction of 'the law expenses of resisting the action at the respondents' in-

'stance, nor of the expenses to which the respondents were found 'entitled in the said action;' and to this interlocutor Lord Mackenzie, and afterwards the Court, unanimously adhered.

D. Cleghorn, W. S.—W. Wallace, W. S.—Agents.

No. 123.

Paterson's Trustees, Pursuers.—*Skene—Marshall.*
G. Brown, Defender.—*D. of F. Moncreiff—More.*

Jan. 16. 1827.
2d Division.
Ld. Cringletie.
M'K.

Debtor and Creditor.—The pursuers, as trustees of the late Robert Paterson, raised an action of count and reckoning against Brown for certain intromissions with Paterson's estate. In this action Brown claimed to be credited, as having twice paid a debt of £200, in evidence of which, he appealed to his being in possession of two retired bills to that amount. On the other hand, the trustees insisted that he should produce vouchers in support of a certain account, the correctness of which, when first lodged, they had by a regular minute admitted without vouchers. The Lord Ordinary and the Court being satisfied, on the report of an accountant, that one of the two bills in Brown's possession had been merely a renewal of the other, which last, instead of being cancelled, had been allowed to remain in his possession, and that he had, in point of fact, only paid the debt once; found that he was not entitled to credit for this sum, and as to the other matter, found that he was entitled to credit without the production of vouchers.

D. and A. Thomson, W. S.—A. Gifford,—Agents.

No. 124.

D. Stewart, Pursuer.—*Forsyth—J. M. Bell.*
Colonel Mitchell and Others, Defenders.—*Robertson.*

Jan. 17. 1827.
1st Division.
H.

Cessio.—In this case the Court repeatedly refused the pursuer the benefit of the cessio, as he appeared to have been guilty of fraud; but at last, after having been upwards of 20 months in prison, they decerned in his favour.

A. M'Intyre,—D. Stewart,—Agents.

D. M'FARLANE, Advocator.—*Jameson—J. Henderson Jun.—Shaw.* No. 125.

J. BROWN, Respondent.—*Forsyth—Bonnell.*

Triennial and Quinquennial Prescription.—Held that neither the triennial nor the quinquennial prescription is applicable to a consignment of goods made in security of an advance of money, and with power to sell in the event of the money not being repaid within a specific period.

Jan. 17. 1827.
1st DIVISION.
Lord Eldin.
S.

ON the 30th of September 1819, M'Farlane, in consideration of an advance of £60, delivered to Brown a quantity of oil, amounting in value to £93 : 3 : 4, and at the same time sent to him an invoice with the following letter:—'I have this day received £60 'sterling to account of the above oil consigned to you as security, 'which oil I allow you to dispose of to the best advantage, unless 'the above £60 is paid within a month of this date.' In virtue of this authority Brown sold the oil, and in November 1824 M'Farlane raised an action against him before the Sheriff of Edinburgh, concluding for payment of a balance of £18.

In defence Brown pleaded, that as the alleged debt was contracted in September 1819, and the action had not been raised till November 1824, the claim was cut off by the triennial, or at least by the quinquennial prescription; and the Sheriff accordingly sustained the plea of prescription, and found that the resting owing could only be instructed by Brown's writ or oath.

M'Farlane then brought an advocation, and maintained these pleas in law:—

1. That as this was not an ordinary contract between buyer and seller, but was a consignment of goods, or more properly a pledge accompanied by a mandate authorizing Brown to sell in a certain event; and as the goods still remained the property of M'Farlane, subject to the lien which Brown held as his factor or agent, and subject to the exercise of the mandate which was given to him to enable him to sell in the event of the pledge not being redeemed; neither the triennial nor the quinquennial prescription could apply; and,

2. That at all events it was inapplicable, as the transaction had taken place under a written contract.

To this it was answered,

1. That as the transaction related to moveables, it had fallen under the quinquennial prescription; and,

2. That as this could only be elided by Brown's writ or oath, and the letter was not written by him, the interlocutor of the Sheriff was correct.

The Lord Ordinary 'advocated the cause, altered the interlocutor of the Sheriff, and repelled the plea of prescription, and 'found expenses due.'

The Court, after hearing Brown's counsel, and without calling upon M'Farlane to answer, adhered.

LORD BALGRAY.—This was a mere consignment of goods in security of a debt, and not a sale; and therefore it is impossible to hold that either of the prescriptions can apply.

The other Judges concurred.

C. FISHER,—D. GRAY,—Agents.

No. 126.

Dr. MILLIGAN, Advocator.—*Skene—Henderson.*
P. MILLIGAN and Others, Respondents.—*G. Bell.*

Jurisdiction—Commissary.—Circumstances under which it was held, that a petition to a Commissary to cause certain effects, alleged to have belonged to a defunct, to be delivered to her representatives, or to inventory and preserve them, was incompetent.

Jan. 17. 1827.
1ST DIVISION.
Lord Eldin.
H.

IN September 1820, Peter Milligan and others, as executors qua nearest in kin of the late Mrs. Helen Irving, presented a petition to the Commissary of Dumfries, stating, 'That the said Helen 'Irving died possessed of various articles of household furniture, 'beds, bedding, bed and table linen, wearing apparel, books, and 'other moveable effects; and the petitioners are informed, and have 'reason to believe, that a considerable part of the said household 'furniture, beds, bedding, bed and table linen, wearing apparel, 'books, and other moveable effects, are now in the possession of 'Elizabeth Johnston Milligan, residing at Grove in the parish 'of Kirkbean, William Murray, schoolmaster at Kirkbean, and 'Peter Milligan in Tallowhairn, also in the parish of Kirkbean: 'That the petitioners being the nearest in kin to the said Helen 'Irving deceased, and executors admitted and confirmed to her 'as before mentioned, have good and undoubted right to take 'and use the whole of the household furniture, and other move'able goods and effects, that belonged to her at the time of her 'death; and they are desirous to obtain possession of the same, 'that they may make up and render an inventory and appraise'ment in terms of law, and use and dispose of the same at plea'sure; but the said Elizabeth Johnston Milligan, William 'Murray, and Peter Milligan in Tallowhairn, decline to part 'with the said goods and effects, without the authority and war'rant of your Lordship to that effect.' They therefore prayed the Commissary 'to decern and ordain the said Elizabeth John-

'ston Milligan, William Murray, and Peter Milligan, to deliver 'to the petitioners the articles of household furniture, beds, bed-'ding, bed and table linen, wearing apparel, books, and other 'moveable effects that belonged to the said Helen Irving de-'ceased at the time of her death, that the petitioners may have 'the same inventoried and appraised in terms of law, and may 'use and dispose of the same at pleasure.'

In defence, these parties stated that they were in possession of these effects, but that they had been placed in their custody by her son, the late James Irving, and that they could not give them up, except with the consent of his representatives.

The Commissary then ordained the executors of James Irving to be called, in consequence of which, Dr. Milligan and John Kerr (since deceased) appeared and maintained,

1. That the right to the effects had been vested in James subsequent to the death of his mother, and that they, as his executors, were entitled to them; and,

2. That such being the case, the petition was incompetent.

The Commissary, 'in respect there appears to be a competition 'of rights between the pursuers and defenders, upon which this 'Court is not competent to decide, granted warrant to, and au-'thorized the clerk of Court to obtain and report proper inven-'tories of the effects in dispute, and thereafter to deposit them in 'the hands of some proper person.'

Thereafter an action of declarator and count and reckoning was brought in the Court of Session by the executors of Mrs. Irving against Dr. Milligan and Kerr, as executors of James Irving, with a view to have the question of right settled. And the above judgment having been reclaimed against, the Commissary, 'in respect there is a process presently depending in the 'Court of Session, upon the decision of which the title of the 'said defenders depends, sisted further procedure as to the rights 'of parties in this incidental application, until the issue of 'said process; but found that, in the event of James Irving's 'settlement being sustained, said defenders will be entitled to 'compete with the pursuers, before this Court, for the effects in 'question; and to that extent altered the interlocutor reclaimed 'against; but adhered thereto in so far as it grants warrant to 'inventory and preserve said effects in the mean time.'

Of these judgments Dr. Milligan brought an advocation, and contended, That as the Commissary had found that he was not competent to decide the question of right, he ought to have dismissed the process simpliciter, instead of granting warrant to inventory, and thereby to invert the possession by removing them

from the custody of those who held them for behoof of James Irving's representatives.

In answer to this it was maintained, That as it was admitted that the effects had originally belonged to Mrs. Irving, and as there was a dispute as to which of the parties had right to them, the Commissary had acted correctly in sisting process as to the question of possession, and in granting warrant to inventory and preserve them till the issue of the declarator; and that it was the peculiar province of the Commissary to entertain all questions as to the effects of defuncts, and more especially to cause them to be inventoried and preserved till the matter of right was decided.

The Lord Ordinary 'advocated the cause, altered the interlocutors of the Commissary complained of, found that the application to him at the instance of the respondents was incompetent, therefore dismissed the same, and found the advocator entitled to expenses both in this and in the Inferior Court;' and to this interlocutor the Court adhered.

The Court appeared to be of opinion, that the Commissary could not competently grant warrant to invert the possession; and that, instead of applying to him, the executors of Mrs. Irving should have moved the Lord Ordinary, in the process of declarator, for warrant to inventory and preserve the effects.

R. Welsh,—T. Johnstone,—Agents.

No. 127. W. Pattison, (Lawrie and Son's Trustee,) Pursuer.—*Skene—Hamilton.*

P. Campbell, Defender.—*D. of F. Moncreiff—Maidment.*

Bill of Exchange—Res Judicata—Process.—Held,—1.—That the presumption of onerosity in favour of the holder of a bill blank indorsed, and delivered subsequently to its dishonour, and after diligence had been raised, can only be redargued by writ or oath;—and,—2.—That the holder having been assoilzied from an action concluding for restitution of the bill, on the ground of having obtained it without value, and in collusion with bankrupts to defraud their creditors, was entitled to plead res judicata against an action of reduction on the same grounds, and containing the same conclusions;—and,—3.—That it is irregular to close a record on mutual memorials.

Jan. 17. 1827.

1st Division. Lord Meadowbank. D.

In 1820, Pattison, as trustee on the sequestrated estate of Lawrie and Company, upholsterers, presented a petition to the Sheriff of Edinburgh, stating, that it appeared from the books of the bankrupts that in 1815 they had received a promissory note for £131 : 12 : 6 from Henry David Erskine, Esq. younger of Ammondell, payable three months after date;—that they had indorsed

it away, and that, after passing through several hands, it had been dishonoured and retired by them, after diligence had been raised upon it; but that neither the bill nor the diligence could be found, and no further traces of them appeared in their books;—that, however, he had ascertained that, within a few days prior to their sequestration, they had applied to the late James M'Culloch of the Royal Hotel to enter into some transaction relative to the bill;—that he had introduced them to Patrick Campbell of the Crown Hotel, to whom they had delivered the bill and diligence; but that he had given no value. He therefore prayed that Campbell should be ordained to deliver up the bill and diligence to him, as trustee on the estate of the bankrupts. In defence, Campbell stated that he had paid full value for the bill; and as it was blank indorsed by the bankrupts, (the posterior indorsations having been deleted,) and he being the holder of it, he must be presumed to be an onerous indorsee; and therefore it was incompetent to compel him to deliver up the bill, or to set aside his right, except in the shape of a reduction. The Sheriff dismissed the action, 'in respect that the bill in question has a blank indorsation by the bankrupts, and is admitted to have been delivered 'to the defender so as to transfer the right to the debt, and consequently to the defender; and that the claim now made by the 'petitioner, the trustee, truly resolves into a challenge of the 'transaction in question upon the statute 1696, c. 5, which is 'only competent by a reduction in the Court of Session;' and to this interlocutor the Court, in an advocation, adhered on the 16th of January 1821.

Pattison then raised an action of reduction, in which, however, he did not libel on the act 1696, c. 5; but alleged that 'the bill 'had been fraudulently obtained by the said defender, in combi-'nation and collusion with James M'Culloch of the Royal Hotel, 'Edinburgh, now deceased, on the eve of the bankruptcy of the 'said Andrew Lawrie and Son, or at least within 60 days of the 'date of the sequestration of their estate, and that without any 'value whatever having been given, either by the said James 'M'Culloch or the defender, to the said Andrew Lawrie and Son, 'for the said promissory note and diligence; and at the time 'the said defender so obtained possession of the promissory note 'and diligence, neither he nor the said James M'Culloch were 'creditors of the said Andrew Lawrie and Son; so that there 'could have been no real intention on the part of the bankrupts 'of transferring the said promissory note or diligence to the de-'fender, and the same therefore are fraudulently kept and de-'tained by the defender from the pursuer, as trustee,' &c. The

conclusion was, that 'the pretended right of the defender to the 'said promissory note, founded on the delivery thereof to him or 'otherways, with all that has followed thereupon, ought to be re-'duced; and that the defender should be ordained to deliver the 'promissory note and diligence to the pursuer.'

The Lord Ordinary having allowed a diligence against havers, which was executed, Pattison, in support of the action, stated that although Campbell kept regular books, yet there was no entry relative to the transaction in them; and that it appeared from a claim which he had made on the estate of M'Culloch, that he merely held the bill in security of an alleged debt due to him by that person, whereby it was evident that he was not an onerous holder; and he contended that although the transaction was not reducible on the act 1696, (seeing that Campbell was not a prior creditor,) yet as no value had been given for it, the bankrupts had not intended to convey the bill to him, and therefore he ought to be ordained to give it up.

In defence, Campbell maintained,

1. That as the conclusion of the action was substantially the same as the prayer of the petition for delivery and restitution, he was entitled to plead res judicata.

2. That the form of the action was irregular, as it did not conclude for reduction of the indorsation in his favour, but merely of his pretended right, founded on the delivery of the bill; and,

3. That as he was the holder of the bill, with a blank indorsation, he must be presumed to have acquired it for an onerous cause, which could only be redargued by his writ or oath; and that the circumstances founded on were insufficient to establish that he has obtained it fraudulently and without value.

The Lord Ordinary, after appointing the case to be stated in mutual memorials, and closing the record upon these pleadings, assoilzied the defender, but found no expenses due.

Both parties having reclaimed, the Court recalled the interlocutor closing the record, adhered on the merits, and found expenses due.

LORD PRESIDENT.—We cannot judge of this case as upon a closed record; and therefore we must recall the order to that effect, and regard it as a case brought before us in terms of the act of sederunt relative to actions in which judgment has been pronounced, either upon representation and answers, or memorials, previous to the Judicature Act having come into operation.

On the merits, this appears to me a very novel species of reduction. It is not a reduction of the bill itself, or of the indorsation, or of an assignation to it, but merely of a pretended right; and the

conclusion is for delivery of the bill. But we found in the previous action that the pursuer was not entitled to restitution of the bill, and therefore it does not appear to me how he can competently insist in the present action. Indeed the former one was the better action of the two for trying the question of right to the possession of the bill.

LORD GILLIES.—I am of the same opinion. In the former action the allegation of the trustee was, that he was in truth the proprietor of the bill, and entitled to restitution of it; and that is just what he maintains here. I also think that no circumstances have been stated sufficient to deprive Campbell of the presumption of law in his favour. The trustee may refer to his oath; or, if he thinks he has any grounds for it, he may bring a reduction on the act 1696.

LORDS BALGRAY and CRAIGIE concurred.

Defender's Authorities.—Chitty, 175; Baillie, 48.

J. PATTISON Jun. W. S.—J. M'GREGOR,—Agents.

D. CARRICK, Suspender.—*Rutherfurd.*
W. MATHER and Others, Chargers.—*Cockburn—Whigham.*

No. 123

Process—Previous Expenses—Stat. 6. Geo. IV. c. 120.—Held,—1.—That it is incompetent, in reviewing the decree of an Inferior Court, to allow a proof by commission in the Court of Session, and that the case must be remitted either to the Jury Court, or to the Inferior Court;—and,—2.—That a suspender of such a decree, who had led a proof in the Inferior Court, and against whom the term had been circumduced, is liable in payment of the previous expenses, before being allowed an additional proof of his averments.

Jan. 17. 1827.

1ST DIVISION. Lord Eldin. H.

MATHER and others raised an action before the Magistrates of Glasgow against Carrick, in which, a proof having been allowed, the suspender adduced evidence, and the chargers having led none, he moved for and obtained circumduction against both parties; and, on advising the case, the Magistrates pronounced decree against him. A charge was thereupon given, of which he brought a suspension, and the record was made up and closed on reasons of suspension and answers, as on a concluded cause. The case having been then debated, the suspender moved to be allowed a proof of his averments; and the Lord Ordinary, 'in respect that the parties are at issue upon the 'material facts of the case, allowed the suspender a proof of his 'averments contained in the closed record, and to the charger 'a conjunct probation;' and granted commission for that purpose.

Mather and others then reclaimed, and contended,

1. That according to the 40th section of the Judicature Act, it was incompetent to allow a proof by commission in such a case as the present, and that this could only be done, either by remitting the

case to the Jury Court, or to the Inferior Court; that as the record had been made up on reasons of suspension and answers, and as on a concluded cause, the suspender was not entitled to have the case remitted to the Jury Court; and,

2. That as a proof had been allowed in the Inferior Court of the averments made by the suspender, which he had not brought, and as the term had been circumduced against him, he was not entitled to such a proof; or at least that it could only be granted to him on condition of payment of the previous expenses.

To this it was answered,

1. That the enactment alluded to referred to advocations, and not to suspensions; that it was immaterial to the suspender whether the proof was taken in this Court or in the Jury Court; and that issues might be framed from the record; and,

2. That the claim for previous expenses was not well founded in point of justice; and that it was incompetent, in a suspension, to remit to the Inferior Court to award expenses against the suspender.

The Court altered the interlocutor, and, on condition of payment of the whole previous expenses, remitted to the Magistrates with instructions to allow the suspender a proof.

LORD PRESIDENT.—We cannot competently take the proof in this Court, but must either send the case to the Jury Court, or to the Inferior Court. As the suspender wishes to have a proof, we can make a remit to that effect to the Inferior Court; but we may do so, on condition of his paying the previous expenses.

LORDS BALGRAY and GILLIES concurred.

W. RENNY, W. S.—D. S. THRESHIE, W. S.—Agents.

No. 129. J. BERRY, Advocator.—*D. of F. Moncreiff—Murray—A. M'Neill.*
J. L. ALLEN.—*Keay—Rutherfurd.*

Landlord and Tenant.—Held that a waygoing tenant, bound by his lease sufficiently to manure his lands, and consume on them all the fodder except that of the last crop, was entitled to the value of dung left on the farm, though made prior to the preceding bear seed-time, when, in relation to the nature and situation of the farm, it was inconsistent with good husbandry, and had been his practice, during the preceding years of the lease, to preserve the dung to be consumed on wheat crops in autumn.

Jan. 17. 1827.
2D DIVISION.
Ld. Cringletie.
M'K.

BERRY was tenant of the farms of Daleally and Loan belonging to Allen, and situated in the Carse of Gowrie, (a wheat district,) under a lease for the period of 19 years from Whitsunday 1802 as to the houses and grass, and the separation of

the crop as to the arable land. The rent stipulated was partly in money and partly in barley, the produce of the lands. In regard to the farm of Loan, the dung and straw of which were steelbow, it was provided 'that the tenant should not be at liberty to lay 'any of the dung and straw remaining on the Loan farm, after 'finishing the wheat seed the last crop under this lease, upon any of 'the lands for the last crop; but the whole of such dung and straw 'shall be reserved for, and delivered over to the proprietor or in-'coming tenant at the time of their entry, without any considera-'tion or recompence for the same.' But as to the farm of Daleally, the straw and dung of which were not steelbow, the tenant was merely taken bound 'to consume upon the ground of the said 'subjects the whole fodder that shall be raised from hay; but 'the whole fodder of the last crop on the farm of Daleally, not-'withstanding the above restriction, he shall have liberty to dis-'pose of as he shall think proper, reserving the landlord's right 'of hypothec;'—the tenant further bound himself 'to suffi-'ciently cultivate, dung, labour, and manure the lands hereby 'set;' and he was also obliged to give the incoming tenant entry to 15 acres of fallow at the Whitsunday before his removal. Berry had, at his entry to Daleally, purchased the straw and dung from the waygoing tenant; and during the course of the lease had been in the practice to sow his wheat in autumn, with whatever dung he had not consumed on the crops of potatoes and turnips in the spring; and during the last year he had put the usual quantity of dung on the lands, leaving, according to the due course of rotation, 50 acres for sowing wheat in autumn, being about one fourth of the whole land possessed by him. At Whitsunday 1821, the term of removal from the houses &c., there was a quantity of dung and straw on the farm of Daleally, which it was agreed should be handed over to the incoming tenant—he paying for whatever Berry might be found entitled to dispose of. In reference to this, the landlord presented an application to the Sheriff of Perthshire, praying him to appoint valuators to value the straw and dung so left on the possession, and on their report to find that he was 'not liable in the price or value of any of the 'dung so left, or, at any rate, of that part thereof which ought 'to have been applied to the lands with the present crop;' nor 'for the straw remaining on the possession, which, in terms of the 'lease, ought to have been consumed on the possession.' Three valuators were accordingly appointed, who each gave in a separate valuation of the straw and dung, and reported that none of the dung had been made after bear seed-time, and that the straw (which was, of course, part of the preceding crop) was not more than sufficient for the use of the farm till the new crop should be

reaped. The Sheriff, on considering these reports, to the correctness of which the valuators were required to depone, 'found, as 'to the dung left on the farm, that by the express stipulation of 'his lease, the defender was bound to consume upon the ground 'of the said subjects the whole of the fodder that shall be raised 'thereupon, but hay, except the fodder of the last crop;—finds 'it reported by the inspectors, that no dung has been made since 'the period of the last bear seed-time; and therefore that the 'whole dung on the premises is derived from the fodder which 'he was bound to have consumed on the ground, and which by 'law he was bound to have laid upon the land for its due cultivation, and therefore that he is not entitled to any remuneration 'for it from the landlord;—finds, as to the straw, that there is 'not more on the possession than was necessary for the purposes 'of the farm till the fodder of the present crop can be brought 'into use, and decerns.'

Berry thereupon brought an advocation, in which it was contended for the landlord,

1. That the various judgments of the Court, from the case of Finnie *v.* Trotter in 1767, down to that of Forrester *v.* Wright in 1808, went to establish a general rule applicable to all circumstances, which was to supersede all argument as to the different modes of culture; and this rule was, that all dung made before bear seed-time should be consumed on the lands that season, and that the tenant was not entitled to any dung except what was made after that period; and,

2. That as the tenant was only entitled by his lease to the straw of the waygoing crop, but to no part of the fodder of any preceding crop, he could not, consistently with the terms of the lease, (which must be strictly considered as the sole rule of decision, agreeably to the judgment of the House of Lords in the case of the Slains tenants,) dispose of any straw, except that of the last crop, nor consequently of any dung made from the straw which he was not entitled to take away; and also that his lease bound him to pay part of his rent in barley, the growth of the lands, which necessarily must be sown with dung in spring, while he had no barley whatever on his farm the last year.

To this it was answered, That the only rule which had been fixed by the decisions of the Court in reference to this subject was, that a tenant is bound to manage his farm tanquam bonus vir; and that if he do so, all the dung remaining on his farm at the date of removal he is entitled to dispose of;—that the result of this rule, therefore, as to the period after which all straw produced is to belong to the tenant, must vary with the character and situation of the farm, and mode of cultivation practised in

the district;—that according to the mode of cultivation followed in the district where this farm was, he was not bound by the rules of good husbandry, or the terms of his lease, to have consumed on his farm the straw and dung in question, which could not with any advantage have been laid on the farm in spring, but was necessarily retained for the wheat to be sown in autumn, which universally formed the principal crop in that part of the country, and out of which, indeed, the rent must be paid;—that it was not alleged that he had improperly withheld dung or fodder, in order to have the benefit of it the last year of his lease;—and further, that the landlord himself had sanctioned and approved of this mode of management, by stipulating as to the farm of Loan, (where the straw and dung were steelbow,) that the tenant should not use for the last crop any dung made after the previous wheat seed-time, which was to be reserved for the use of the incoming tenant;—and, in regard to his having no barley on his farm, that the stipulation in the lease did not mean that the grain paid in rent was to be the actual produce of the farm, but merely of equal quality with barley grown on the farm, and accordingly that the grain accepted as rent during the previous years of the lease had not been the growth of the farm, but grain of the best quality in the district.

The Lord Ordinary, after ordering condescendences, and allowing a proof as to the fact of Berry having purchased the straw and dung of the outgoing tenant at his entry, for the reasons stated at length in his Lordship's notes, and particularly on the ground, as expressed in the interlocutor, that it was not denied that the advocator had 'applied the manure 'made on his farm to the land thereof in the autumn and win-'ter of the year 1820, and in the spring of 1821, in the same 'manner as he had done in the former years thereof;' and 'that 'if he shall not be paid for the dung left on his farm, his suc-'cessor, the incoming tenant, will get a crop of wheat at his ex-'pense,' advocated the cause, altered the Sheriff's interlocutor, and found Berry entitled to the value of the dung and straw, according to a medium of the three reporters' valuations.

The Court having adhered to this interlocutor, Allen reclaimed, and in his petition made some general allegations as to Berry having miscropped his farm, but, on a question to that effect by the Court, he did not undertake to establish them, and their Lordships accordingly again adhered, reserving to the Lord Ordinary to hear parties as to whether the valuation was to be taken according to the average of three valuators, or on what principle, and also as to a claim for interest made by the tenant.

The Lord Ordinary observed in his notes,—

In this case the questions are properly, 1. To what quantity of dung the landlord is entitled without paying for it? And, 2. Is he entitled to the straw of crop 1820, remaining at Whitsunday, without paying for it? On the latter point the Sheriff's interlocutor is silent. The obligation in the lease is, that the tenant shall 'consume 'upon the ground of the said subjects the whole fodder that shall be 'raised thereupon, except hay; but the whole fodder of the last 'crop on the farm of Daleally, notwithstanding the above stipulation, 'he shall have liberty to dispose of as he shall think proper.' Nothing is here said about dung; but there follows an obligation 'sufficiently to cultivate, dung, labour, and manure the lands hereby 'set,' which of course, as well as the common law, obliged him to dung sufficiently the land for the last crop, as well as any other during the lease; and if he did not do so, he is certainly not entitled to the payment of any dung which ought to have been put on the ground in conformity to the practice of the seven years preceding the expiry of his lease; while, on the contrary, he is entitled to payment for all he has left, over and above what ought to have been used.

Law is a science which must vary with the manners and customs of society, and improvements in every department; and consequently it appears to the Lord Ordinary impossible that any judgment of this Court, applicable to the mode of agriculture 40 years ago, can regulate it now when the system is greatly improved; nor that a judgment applicable to one sort of land can govern the management of a soil totally different. For instance, in many parts of Scotland wheat cannot be raised with advantage; and consequently, as all the crops are sown in the spring, the manure made in the winter ought to be applied to the land in the spring season, in so far as it is not necessary for the land under turnips, which are generally sown in the end of May and beginning of June: On the contrary, where wheat is the principal crop, it is always sown with dung; and if it be sown in autumn and beginning of winter, it is manifest that this dung must have been chiefly raised in the preceding winter and spring; almost no dung is made in summer. To say, then, that the advocator, if it was his practice to bestow his dung on his wheat, was bound to lay the winter and spring made dung on his spring crops, is to say that the incoming tenant could have no wheat sown the year of his entry to possession, unless on the ground which had been under potatoes and turnips that year.

The question at issue is not, whether the advocator's mode of management was the best, or whether it was exceptionable. The presumption that it was good is in his favour, as there neither was nor is in the petition to the Sheriff any complaint of misbehaviour; the dispute is respecting the quantity of dung to be paid for by the incoming tenant. The advocator has sufficiently and distinctly explained in his condescendence his rotation of crops, and his mode

of manuring. He says, that as to his wheat, whether sown in winter, perhaps in spring, but whichever it was, he used on it all his dung, except what he applied to turnips and potatoes in spring. This may be bad management; but the Lord Ordinary must repeat that this is not the question. The advocator farther condescends, that he used the same quantity of dung to the last crop that he did to the former ones; and, as this is not denied, the Lord Ordinary holds it to be true. Indeed the answers are anything but what they ought to be, being a pleading from one end to the other. Holding it, then, to be true that as much dung was used by the advocator in the last year of his lease as he used in former years, and that he did not vary his practice, the Lord Ordinary denies the conclusion drawn by the Sheriff, viz. that the advocator was bound by law to have laid the whole dung on the farm in spring on the land. The Lord Ordinary knows enough of farming to affirm, without hazard of contradiction, that it is desirable to have a farm put under a course of good management, and so as that the incoming tenant, where a change of tenants is necessary, can continue the same system observed by his predecessor. In this case the Lord Ordinary presumes the system of the advocator to have been good, since there is no complaint of it. Clear it is, that it is a farm on which large quantities of wheat grew annually; and if all the dung made in the winter and spring had been laid on the land, there could have been no autumn or winter-sown wheat that year; so that the interlocutor of the Sheriff would disturb the regular course of management of the farm.

The decision quoted by the respondent has no application to this cause. In that case, 19th February 1818, Forrester *v.* Wright, the tenant was explicitly bound 'to eat and consume the whole straw 'growing on the said lands with his bestial, and lay the whole dung 'the last year of his tack at bear seed-time.' The judgment there was neither more nor less than finding that a tenant must implement his lease; but here there is not a word in the tack about dung.

Lord Glenlee.—I see no reason for altering. It is no doubt stipulated that the tenant is to consume the whole fodder, except that of the last crop, and to manage the farm according to the rules of good husbandry; and the whole allegation on the part of the landlord is, that it is not consistent with such rules to reserve any dung at all, but that it ought to have been entirely laid out on the spring crops. There was no such general rule established by the case of Finnie, as that in all places, and in all circumstances, a tenant must lay the whole dung on his spring crops. It only establishes that he must lay out all his dung as it is made, tanquam bonus vir; but surely in a case regarding a farm on the Pentland hills, and 50 years ago, the Court never meant to lay down a rule of husbandry for all parts of the country, and every period of time. The only question therefore still is, if in the Carse of Gowrie it is contrary to the rules of good husbandry to reserve dung for the autumn crops of wheat? The stipulations as to the

farm of Loan are only alluded to for the purpose of showing what the landlord himself considers to be good husbandry; and if he had thought otherwise, why did he not challenge the practice of reserving the dung during the course of the tack? He insists that the rules of good husbandry should be reversed at the end of the tack, that he may benefit by it, and wants to make the farm steelbow at the tenant's expense, rather than his own. If the tenant followed during the previous years, without challenge, the very same course which he did the last, I do not see how the landlord can insist on a different rule for the last year. As to the straw, he is no doubt taken bound to consume it; but the challenge here is as to his having straw in June. But he was surely entitled to have as much as he might have consumed before Martinmas. The very prayer of Allen's petition to the Sheriff is not for finding that all the dung was to belong to him, but only that part which should have been applied to the spring crops; which brings it just to the question, whether any part should have been so applied? He is now, therefore, going beyond the limits of his own petition.

Lord Pitmilly.—I formerly differed from the interlocutor, and I still retain my opinion. I cannot reconcile the judgment to the decision in the case of Finnie, and others following it, as fixing a general rule; and in Finnie's there was no express clause binding the tenant to consume the fodder, as there is here.

Lord Alloway.—The more the case is canvassed, the more clear does it appear to me that the judgment is right. The averments of the tenant as to his modes of management have never been denied in such a way as to lead us to doubt their accuracy, or render it necessary to allow a proof of them. Finnie's case is no authority to tie us down in the circumstances which occur here. The farm there was steelbow,—the tenant could not sell an ounce of dung,—and the price was merely held out to him as an inducement to gather dung. The bear seed-time in general is not till after Whitsunday, by which time the tenant has removed from the houses, and of course can make no dung to be paid for. The tenant here, too, was bound to leave fallow, and the incoming tenant could not possibly have got dung for it, if it had all been expended on the spring crops. I still retain my opinion that the interlocutor is right.

Lord Justice-Clerk.—I likewise concurred in the judgment formerly, in pronouncing which we do not need to overturn any general rule; and I have not altered my opinion. My only difficulty was as to the straw; but I think the finding is no more than this, that at the time there was no more straw on the farm than was necessary for consumption before Martinmas.

Respondent's Authorities.—Finnie, June 27. 1767, (15260); Pringle, June 30. 1796, (6575); E. of Wemyss, June 16. 1801, (Ap. Tack, 7); Forrester, Feb. 19. 1808, (F. C.)

A. Pearson, W. S.—R. Kennedy, W. S.—Agents.

J. CAMPBELL and Others, (MACALISTER's Trustees,) Pursuers.— *Cockburn—Brown.*
K. M'DONALD MACALISTER, Defender.—*Greenshields—More.*

No. 130.

Donation—Presumption.—An opulent uncle having advanced money for the education and outfit of his nephew during his minority, and who was in poor circumstances, and having entered it in his books, but having died without requiring repayment, or taking any document of debt—Held that it was to be presumed that the advances had been made animo donandi, and that his trustees were not entitled, after his death, to insist on repayment.

Jan. 18. 1827.

1ST DIVISION. Lord Meadowbank. D.

THE late General Keith Macalister was the uncle of the defender, whose father was tenant of a small farm in the highlands of Scotland; and the General having acquired a large fortune in India, and having returned to London, desired that the defender, who was his namesake, and then about 14 years of age, should be sent to him. He accordingly went to London; and after residing in the General's house for some time, was placed by him at school, and afterwards obtained through his means an appointment as midshipman of an East Indiaman. The General was at the expense of his education and outfit, and occasionally advanced money to enable him to maintain the rank in which he had placed him. On the death of the General, it was found that the sums so expended by him were regularly entered against the defender in his books; but he had never required any document from the defender, nor made any claim either on him or his father for repayment, but, on the contrary, had remitted to the latter a sum of £1500, (which had been left to him by another brother,) without making any deduction. The sums so advanced amounted to £311. 8d.; and the defender being now in opulent circumstances, the trustees of the General brought an action against him for repayment of the amount, with interest.

In defence he maintained these pleas:

1. That the presumption is, that the advances and furnishings made by an uncle, or other relation, who chooses, either during the life, or after the death of the immediate parents of a minor, to undertake the charge of his education and outfit, are given ex pietate, and not for the purpose of establishing a debt against the minor.

2. That such a relation making these advances, during the life of the parents of the minor, can make no claim against the minor which the parents themselves could not do; and his claim, if well founded at all, lies against the father, and not against the minor.

3. That the father can make no claim against his son, however prosperous he may become in after life, for the expense of his maintenance, education, and outfit, during minority.

On the other hand, the plea of the pursuers was, that donation is not in dubio to be presumed; and they contended, that as the advances were made by General Macalister, without any legal or natural obligation being imposed on him, he thereby became the defender's creditor; and that even if he had alimented him in his own house, he would have been entitled to a recompense, seeing that the defender was then minor.

The Lord Ordinary 'found it admitted that the father of the 'defender was alive, and not incapable of alimenting and educat-'ing his son at the time the advances in question were made by 'the late General Macalister for his behoof; that it is not alleged 'that any agreement or paction relative to the said advances was 'made betwixt the said General Macalister and the father of the 'defender, either on his own account, or as administrator of his 'son: Therefore that it must be fairly presumed that the same 'were not made with the view of being charged as debts either 'against the one party or the other, but animo donandi; and that 'this presumption is strengthened and confirmed by the admitted 'circumstance, that no claim for reimbursement ever was made 'against the defender by the General during his lifetime, and 'that a large sum of money was paid to the defender's father, 'without deduction being made on account thereof: Therefore 'assoilzied the defender, and found him entitled to expenses.'

To this interlocutor the Court unanimously adhered.

LORD PRESIDENT.—I think the interlocutor is right, and indeed stronger cases have occurred than the present, where repayment of advances has been refused. In particular, I may refer to the case of M'Dougal's Creditors *v.* M'Dougal, (31st January 1804, No. 21, Ap. Bankrupt,) where it was found that the creditors of the late Mr. M'Dougal were not entitled to insist for repayment from his son of sums of money advanced to purchase him a commission in the army, and for his support, all of which were regularly entered in Mr. M'Dougal's books. The same question occurred in the case of Norval of Boghall, where his executors tried to recover money which he had advanced for the son of a poor neighbour, but without success. In neither of these cases was any acknowledgment taken from the alleged debtor; and it was therefore held that in the circumstances donation was to be presumed, and that it was of no importance that the party advancing the money had entered it in his books.

LORD BALGRAY.—The circumstance of the General making the entries in his books merely proves that he kept an accurate account of all the money he expended, but not that he intended to insist on repayment of the amount.

LORDS CRAIGIE and GILLIES concurred.

J. BRIDGES, W. S.—M. MACDONALD, W. S.—Agents.

W. WADDEL, Advocator.—*Monteith.* No. 131.
R. PARK, Respondent.—*Skene.*

THIS was a question of expenses, depending on the conduct of the parties. The Lord Ordinary found Waddel entitled to them, and the Court adhered.

Jan. 18. 1827.
1ST DIVISION.
Lord Eldin.
D.

J. HAMILTON, W. S.—MACK and WOTHERSPOON, W. S.—Agents.

S. GRAHAM, Advocator.—*A. M'Neill.* No. 132.
W. MARTIN, Respondent.—*Graham Bell.*

THIS was a special case, in which the Sheriff of Dumfries-shire assoilzied Martin from a claim on the part of Graham for delivery of a bill. The Lord Ordinary remitted simpliciter; and the Court adhered.

Jan. 18. 1827.
2D DIVISION.
Ld. Cringletie.
M'K.

R. KENNEDY, W. S.—W. LITTLE,—Agents.

J. RUSSEL, (Trustee of the FALKIRK UNION BANK,) Pursuer.— No. 133.
Baird.
R. GLEN and Others, Defenders.—*M'Neill.*

Mutual Contract—Society—Settled Account.—It having been stipulated by the original contract of a partnership that the books should be balanced annually on the 15th of May, and that the representatives of a deceasing partner should be settled with by a medium struck between the annual balance prior to his death and the period of it; and the company having, by a subsequent resolution, declared that the balance should be struck annually on the 30th of April; and the balances having been made accordingly—Held that the balances so struck could not be altered, but must be considered as correct, and conclusive against all concerned.

THE late Alexander Glen was a partner of the Falkirk Union Bank. By the terms of the contract, which was executed in 1802, it was provided that the books should be regularly balanced upon the 15th of May yearly;—that upon the death of any partner, his interest in the stock and profits should cease, and that his

Jan. 19. 1827.
1ST DIVISION.
Lord Meadowbank.
H.

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Jan. 19. 1827.
1ST DIVISION.
Lord Meadowbank.
H.

share should vest in the other partners; but that the company should 'be bound to account to the representatives of such deceased 'partners for the value of his share or shares, and interest in the 'profits thereof, as ascertained by a medium struck between the 'general annual balance of the company's books immediately pre-'ceding and that immediately following the death of such partner.'

By a resolution of the company in 1805, the day for striking the annual balance was changed from the 15th of May to the 30th of April, and the balances were thenceforth made up accordingly, and in particular they were struck on the 30th of April 1808.

Glen died on the 18th of May of the same year, and on the 30th of April 1809 another annual balance was struck. On the 12th of December thereafter, the cashier paid to Glen's representatives £1500, for which an acknowledgment was given in these terms:— 'I have received your remittance of fifteen hundred pounds ster-'ling, which I, as factor for the tutors and curators to the child-'ren of the deceased Alexander Glen, have applied to account of 'the shares held by the said Mr. Glen in the stock of the Falkirk 'Union Bank; and whatever the value of the said shares, when 'adjusted agreeably to the company's contract, may exceed the 'above sum, the Bank will further account for the same; and if 'it shall turn out less than the said sum, I oblige myself to ac-'count to the Bank for the said deficiency.'

The estates of the Bank were sequestrated in 1816, and Russel, as trustee, then brought an action of count and reckoning against the defenders, the representatives of Glen, founding on the above letter, in which he contended, That the books of the company ought to be balanced as on the 15th of May annually, in terms of the contract; or that, at all events, the balances struck in each year should be opened up; and that, in making up the new balances, all omissions and errors should be corrected, and all the debts due to the Bank, which were desperate or irrecoverable, should be taken into consideration, and distinguished from those which proved available, so that true and accurate balances, agreeably to the real and actual state of the Bank's business, as at the period of Mr. Glen's death, might be ascertained. On the other hand, Glen's representatives maintained, That it was not competent to open up these balances, nor to take into consideration any debts which might eventually have turned out bad; that the balances of April 1808 and 1809 in like manner could not be disturbed; and that the value of the shares must be judged of accordingly.

The Lord Ordinary found, 'That at a general meeting of

'the partners of the company held on 12th November 1805, it 'was resolved to alter the day for the annual balance of the com- 'pany's books, required by the contract, from 15th May to 30th 'April in each year, and that thenceforward the books were 'brought to an annual balance as at 30th April only, and that 'these annual balances were adopted and acted upon by all con- 'cerned, and must be held as coming in place of the annual ba- 'lances of 15th May, specified in the contract: That the annual 'balances struck in the company's books previous to the 30th 'April 1808 cannot now be altered or disturbed, but must be 'held as correct; and remits to an accountant to report, upon 'these principles, the true balances of the company's books as at '30th April 1808 and 30th April 1809, and the value of Mr. 'Glen's interest in the stock and shares of the company, as ascer- 'tained by a medium struck between those two balances, in terms 'of the contract.'

Both parties reclaimed,—Russel maintaining that all the balances should be opened up,—and Glen's representatives, that those of 1808 and 1809 should remain untouched. The Court refused the reclaiming note for Russel; but altered on that for Glen's representatives, and found that the balances of 1808 and 1809 could not be opened up.

The Court were of opinion, that as it had been stipulated by the contract that the rights of a deceasing partner should be regulated and ascertained by a medium struck between the general annual balance immediately preceding and that immediately following his death, this was a fundamental condition of the contract or species transactionis between the parties, and therefore it was not competent to disturb these balances.

D. and A. Thomson, W. S.—J. Mackenzie,—Agents.

R. Hill, Pursuer.—*Maidment.* No. 134.
General A. Leith Hay, Defender.—*Gordon.*

Non-Entry.—Circumstances under which an action of non-entry was dismissed.

Jan. 19. 1827.

1st Division. Lord Meadowbank. H.

Hill, as superior of Templelands, brought an action of non-entry against General Hay, alleging that certain lands belonging to him were included among those of which he was superior. The question came to be one of identity; and the Lord Ordinary and the Court, in respect that Hill had failed to condescend upon evidence sufficient to identify the lands possessed by the defender with those claimed, assoilzied him with expenses.

J. B. Gracie, W. S.—R. Burnett, W. S.—Agents.

No. 135. J. Dougall and Others, Advocators.—*Sol.-Gen. Hope—A. M'Neill.*

W. Hutchison and Others, Respondents.—*Forsyth—Cockburn.*

Property — Public Police. — Under a police act allowing the commissioners of police to line buildings in streets for the benefit of the public, neighbouring proprietors are not entitled to insist that a party who has pulled down his house shall, in erecting a new one, line back his wall, so as to widen the street.

Jan. 19. 1827.

2d Division. Lord Mackenzie.

B.

The respondents were proprietors of a corner house, having no area behind, in the barony of Gorbals, situated at the junction of a lane called Kirk street with the Main street of Gorbals, which is the principal entrance to Glasgow from the south. This house having fallen into disrepair, a decree for repairs was pronounced by the Bailies of Gorbals; but the Glasgow Bridge Commissioners having offered the respondents £300, if they would take down the house, and in rebuilding line back the front towards Main street a few feet, they consented, and pulled down the house.

According to the usage of the barony, it is necessary, before erecting any building, to raise a process of lining before the Bailies; and by the Police Act, 4th Geo. IV. c. 71, it is provided, 'That as the said bailies have been in use, upon report of their 'birleymen or liners, and after inspecting the premises, and hearing parties, to line the front of any houses or buildings about to 'be rebuilt in front of the streets, lanes, or passages within the 'said barony, so it shall and may be lawful for the said bailies, 'or any one of them, and they are hereby empowered, upon complaint and application made to them by said commissioners, or 'any individual neighbouring proprietor, after visiting the premises, and hearing parties concerned, to line the front of any 'house or building to be erected in any of the streets, passages, 'or lanes within the said barony, in such manner as they may see 'necessary for preserving the regularity of the line of building in 'the said streets, passages, or lanes.'

Before proceeding, therefore, to erect their new house, the respondents presented a petition for lining, which they served on Taylor, the conterminous heritor in Main street; but one of the respondents being himself proprietor of the neighbouring tenement in Kirk street, they did not consider it necessary to summon any of the heritors in that street. On this petition the Bailies remitted to the birleymen, who, after inspecting the premises, reported that the front to Main street should be lined according to the agreement with the Bridge Commissioners, and the front towards Kirk street, according to the line of the old wall. Decree of

lining was accordingly pronounced in these terms, and the respondents commenced building their house. They were interrupted, however, by a bill of suspension and interdict presented by Dougall and others, proprietors of houses in Kirk street, who contended that they were entitled to insist on the front of the new building towards Kirk street being put about eight feet further back than the old house had been, for the purpose of producing a regular line in that street. On this bill the Lord Ordinary remitted to the Bailies of Gorbals 'to recall the decree of lining complained 'of; to allow such of the complainers as can show themselves to 'be neighbouring proprietors to appear and be heard in the appli-'cation; and thereupon to do as to them shall appear just, and 'agreeable to the statute.' The Bailies accordingly recalled their decree, and, after having heard the advocators, pronounced this interlocutor:—

'Finds that at common law, and independently of the statute 'regulating the police of the barony of Gorbals, this Court, in 'lining or ascertaining the boundaries of the properties of pri-'vate individuals, has no power, upon the grounds of public con-'venience, to deprive these individuals of any considerable part 'of their property, by compelling them to recede with their build-'ings, or otherwise, without an adequate compensation; Smellie 'v. Struthers, 12th May 1803: Finds that the clause of the ex-'isting police act for the barony of Gorbals, 4th Geo. IV. c. 71, 'which authorizes the Court to line the fronts of houses in such 'manner as may be necessary for preserving the regularity of the 'line of building in the public streets, does not convey such a 'power, or provide such a compensation: Finds that in terms of 'the clause of said statute which authorizes this Court to remove 'out-stairs, out-shots, buildings, erections, &c., and which provides 'that the damage thereby occasioned to the proprietors, for the 'purpose of public convenience and accommodation, shall be de-'frayed out of the public funds arising under the act, the appli-'cation must be made at the instance, not of private individuals 'like the complainers, but of the commissioners of police: Finds 'it not alleged by the complainers that, by the decree of lining 'complained of, the pursuer is authorized to exceed the limits of 'his old tenement now taken down, on the south where it fronted 'Kirk street, or to encroach to any extent upon the area of the 'said street; and finds accordingly that the complaint made by 'the complainers is not for the prevention of an attempted en-'croachment, but for the removal of an old building, or at least 'for preventing the pursuer from occupying with a new building 'a part of the area of ground upon which the old building was

'erected;' and they decerned of new in terms of the former decree of lining.

Dougall &c. thereupon brought an advocation, in which they stated that they were willing to allow the respondents any 'damages which may be fairly claimed' in consequence of the loss of property which would be occasioned by the lining contended for by them, and they pleaded, that under the police act it was imperative on the Bailies, on the suit of parties interested, to line new buildings, so as to produce regularity in the streets; and at all events that the decree was invalid, in so far as the Bailies had not, in terms of the statute, personally inspected the premises.

The Lord Ordinary remitted simpliciter, with expenses, and the Court unanimously adhered.

The Lord Ordinary observed in a note:—

The Lord Ordinary made the remit to the Magistrates, simply because he thought it a case in which the opinion of the local Judge ought to be given on the case fairly before him. The Lord Ordinary now concurs in that decision. It appears to him, that although the statute gives a power to the Bailies to line the front of any house in such a manner as they may see necessary for preserving the regularity of the line of building, yet it does not impose upon them so very harsh a duty as that of confiscating all private property that happens to interfere with the regular line, or sufficient width of the street, whenever that property comes to have the houses on it taken down. Such a duty might naturally be imposed on the governor of a town which was in the occupation of an enemy, who wished to make it more regular for the purpose of military defence, and treated the inhabitants and their property with hostile disregard. But it is not possible to believe this was intended to be enacted by a British statute for part of the suburbs of Glasgow. The power must have been meant to be exercised with equitable discretion, i. e. where it could be done without serious loss to the party, and certainly not in such a case as the present, where the new line would cut off a great part of the only stance the respondent has for his house.

Lord Glenlee.—I can see no reason for differing from the Lord Ordinary. As to any original or inherent right, independent of statute, I can understand how all operations that narrow the street may be prevented or removed; but I have no idea that, in order to make a street wider, you may make a party give up part of his property without recompense. No doubt, under the act of Parliament, the Bailies are entitled, for behoof of the public, when a house is rebuilding, to line it back on giving compensation, and for the benefit of the community; but the statute gives no right, either to the Magistrates or private persons, to widen streets for the benefit of individuals. The provision as to calling neighbouring proprietors is not with

any view of enabling them to insist on the street being made wider, but merely to see that no encroachment is made on their properties, or on the street as it stands. If the parties here wish the street wider, let them buy the property.

LORD PITMILLY.—I am entirely of the same opinion. The statute gives a discretionary power to the Magistrates, which they are to exercise for the benefit of the public, and in the present case they have exercised a sound discretion.

LORDS JUSTICE-CLERK and ALLOWAY concurred.

T. MEGGET, W. S.—D. FISHER,—Agents.

A. THOMSON, Advocator.—*Jameson.*
T. HARVIE, Respondent.—*Skene.*

No. 136.

Landlord and Tenant—Clause.—Circumstances in which a party who had taken a piece of waste ground for one or two years, was entitled, at his removal, to the materials of certain erections made by him thereon.

Jan. 19. 1827.

2D DIVISION. Lord Mackenzie. B.

THOMSON was proprietor of a building in Glasgow some time used as a theatre, with a piece of vacant ground adjacent, destined for building-stances. In 1815 he let the whole premises to Dunbar and Company for four years, by a missive which provided that they should be at liberty to remove the additions they might make, but obliged them to leave the premises in the same state as at their entry, should Thomson not approve of taking the additions at a valuation. On Dunbar and Company's removal in 1819, Thomson let the building to Mason for three years to be used as a minor theatre, he being authorized to alter the interior to suit his own purposes, and taken bound, at the end of the lease, 'to realter and reconvert the whole premises into 'the same state in which they now are;' and he also granted to Harvie, the respondent, the following missive drawn out by himself:—'Mr. Thomson lets to Mr. Harvie the ground to the 'north of the entry in front of the old theatre, Dunlop street, on 'which a shed is erected by Dunbar and Company, Mr. Harvie 'being obliged to leave 18 feet clear from the theatre to what-'ever shed he may retain or build thereon; in short, to conform 'himself to Mr. Mason's tack, which he has seen, and that from 'Whitsunday 1819 to Whitsunday 1820, at a rent of seven guineas 'per annum, and Mr. Thomson is to renew the same annually 'during the currency of Mr. Mason's lease, viz. three years at 'same rent, except in case of sale, in which case Mr. Harvie 'must remove immediately, and is to have liberty of taking away 'the present or what building he may erect, paying rent to him,

'to the time of removal, at the above rate per annum from last 'term's payment.' Dunbar and Company had erected on the premises a wooden shed roofed with tile, which they used as a coach-shed, and which was purchased by Harvie at his entry, and by him converted into a slight building of brick. Harvie was allowed to possess the property for the whole period of three years, and, from neglect to give proper warning, he remained in possession for a fourth year. At the term of removal in 1824, Harvie having intimated an intention to carry away the materials of the buildings erected by him, Thomson presented a petition to the Magistrates of Glasgow for an interdict; and Harvie, on the other hand, presented a counter petition to have it found that Thomson was bound to pay him the value of these erections, if allowed to remain on the premises. After some procedure, the Magistrates pronounced an interlocutor containing various findings, and decerning against Thomson for £15, the estimated value of the materials of the buildings. Thomson thereupon brought an advocation, in which the Lord Ordinary remitted simpliciter; and the Court, while they recalled his Lordship's interlocutor, and advocated the cause with the view of avoiding an affirmance of the special findings in the Magistrates' interlocutor, likewise decerned against Thomson for payment of the £15, with expenses.

LORD JUSTICE-CLERK.—Although the judgment of the Magistrates is substantially right, it is not necessary to affirm the various findings in it, and we must guard against that. But it appears to me that the meaning of parties is clearly shown by a reference to the lease of Mason, who was entitled to take away his additions, &c.; and it is really a very judaical construction of the terms of the missive to limit the right to carry away erections to the case of removal before the expiry of this short lease of three years,—more especially as it was drawn out by Thomson himself, and ought therefore to be construed against him where there is anything ambiguous, and as the buildings were erected chiefly with the materials of the former shed purchased by Harvie from Dunbar and Company.

LORD GLENLEE.—I would not wish to acquiesce in the finding of the Magistrates; for this case is not to be looked on as if it were a tack of lands, but rather a bargain for the temporary use of a piece of waste ground intended for building, and we must not regulate it by the ordinary rules of regular tacks. There is, no doubt, an ambiguity in the missive; but, in construing it, we are entitled to look at what is equitable and reasonable in the circumstances of the parties; and besides, I am not sure but that, in grammatical construction, the provision as to erections is intended to be joined to the whole of the

missive, and not merely to the special case of the party removing before the expiry of three years.

LORDS PITMILLY and ALLOWAY concurred.

CAMPBELL and MACDOWALL,—MACMILLAN and GRANT, W. S.—Agents.

W. M'LURE, Advocator.—*Cockburn—A. M'Neill.*
W. JAFFRAY Jun., Respondent.—*Jeffrey—Wilson.*

No. 137.

Process—Expenses.—Incompetent, pending an action in the Jury Court, to apply to an Inferior Judge to obtain production of books to be founded on in the action, instead of applying by motion to the Jury Court; and held to be no ground for being relieved of the expenses of litigation thereby occasioned, that a party against whom it was brought had returned no answer to several previous extra-judicial applications by letter and protest.

Jan. 19. 1827.

2D DIVISION. Lord Mackenzie. M'K.

DURING the dependence in the Jury Court of an action of damages at the instance of M'Lure against Jaffray, and before any order for a condescendence had been pronounced, M'Lure's agent in Glasgow wrote to Jaffray, of date 4th March 1824, at which time the Jury Court was not sitting, civilly requesting him to deliver up certain books of a company of which M'Lure had been a partner along with Jaffray's brother, 'with the view of 'enabling his counsel to prepare a condescendence.' No answer having been returned, M'Lure's agent wrote a second time, a few days afterwards, repeating the request, and adding, 'If I 'do not hear from you before one o'clock to-morrow afternoon 'that you are willing to deliver up the books, I shall be under 'the necessity of taking immediate steps against you for the pur-'pose of attaining that object.' Jaffray, having returned no answer to this second application, he was, on the 6th of April following, served with a protest in name of M'Lure, bearing, that unless the books 'were delivered to the said William M'Lure before 11 'o'clock of the forenoon of the following day, he would im-'mediately thereafter present a petition and complaint against 'the said William Jaffray to the Court on the subject, or would 'take such other steps against the said William Jaffray as he 'might be advised.' Jaffray treated this protest in the same way as the letters, and M'Lure thereupon the next day presented a petition to the Magistrates of Glasgow, praying to have Jaffray ordained to deliver up the books in question, or (as limited in some of his subsequent pleadings) to produce them in the hands of some respectable accountant for a reasonable period, that he might have access to them. The Magistrates, after some procedure, assoilzied Jaffray, with expenses, of date 14th May, re-

serving to M'Lure to apply to the Jury Court for a diligence. This M'Lure accordingly did; and on a motion made in the Jury Court on 19th May, an order was pronounced, allowing him to examine the books in Jaffray's hands; and thereafter the Magistrates of Glasgow refused a reclaiming petition which had been given in against their judgment by M'Lure, who thereupon brought the present advocation as to the decerniture for expenses against him, and contended that the whole litigation before the Magistrates was owing to Jaffray not having answered the several applications made to him, and consented to an examination of the books, which the Jury Court ultimately ordered.

The Lord Ordinary advocated the cause, and found that no expenses were due by M'Lure to Jaffray; but the Court unanimously altered, and remitted simpliciter.

Lord Justice-Clerk. — Since it became customary for agents to make a charge for every letter written by them, the practice of writing letters upon every occasion has become a great deal too common; and we certainly will not encourage it by laying down a rule, that when no answer is given, the expenses of any subsequent legal proceeding are to follow. We must look here to the character of the proceedings, and we see that this advocator, instead of making a motion in the Jury Court, goes to a Court which had nothing to do with the matter. He had no right to make this the subject of a separate litigation, when he had his proper recourse in the Jury Court; and having raised a process which never ought to have been raised, he must undoubtedly be liable in the expenses of it.

Lord Pitmilly.—I entirely concur. This party applies for delivery of the books before any order for a condescendence; and although the Jury Court was not sitting, he ought to have waited till they met, and made his motion, and the Court would have allowed him the necessary time for preparing his condescendence. But, instead of doing so, he brings this incompetent and improper action, which having been dismissed, it necessarily follows that he should be subjected in expenses. There was no occasion on the part of Jaffray to answer the letters sent him, and it is proper that proceedings of this nature should be checked.

Lords Glenlee and Alloway concurred.

R. Kennedy, W. S.—W. Mercer, W. S.—Agents.

J. KING, Suspender.—*Skene.*
W. SHIRRA, Charger.—*Monteith.*

No. 138.

Principal and Agent.—Held that where a party has acted professedly in the capacity of agent, a petitory action against him, and not against his principal, is incompetent.

Jan. 23. 1827.

1ST DIVISION. Lord Meadowbank. S.

SHIRRA raised an action against King, before the Magistrates of Glasgow, for payment of £6 : 13 : 5. In support of his claim he stated, that King was agent in Glasgow for the Falkirk Banking Company; that in that capacity Shirra had purchased from him two bills for £100, which had been dishonoured, and for which he had paid him 10s. per pound, being £50; that at the same time he had discounted a bill with him as agent of the Bank, from the proceeds of which King had unwarrantably retained the sum sued for, on the allegation that it was on account of expenses incurred relative to the dishonoured bills.

King Shirra entered upon the merits, without making any objection as to his not being the proper party; and decree having been pronounced against him, he brought a suspension, in which he pleaded, That as both the purchase of the bills, and the discounting of that from which the sum sued for was alleged to have been retained, took place with him in the capacity of agent for the Falkirk Bank, he was not the party who ought to have been called.

To this it was answered,

1. That the objection was too late, as King had joined issue on the merits; and,

2. That it was an illegal act on his part to retain any part of the proceeds of the discounted bill, for which he was personally responsible.

The Lord Ordinary suspended the letters simpliciter, 'in re-'spect the proper party was not called in the Inferior Court,' and found the suspender entitled to expenses in this Court.

Both parties reclaimed. Shirra maintained that the interlocutor was erroneous; and King, that he ought to have been allowed expenses in the Inferior Court.

The Court refused the reclaiming note for Shirra, and found expenses due to King both in this and the Inferior Court.

T. KER, W. S.—D. BROWN, W. S.—Agents.

No. 139. C. M'LEAN, Advocator.—*A. M'Neill.*
Mrs. BELL and Mrs. M'KINLAY, Respondents.—*J. M. Bell.*

Process—Stat. 6. Geo: IV. c. 120.—Jurisdiction.—Held incompetent for a Sheriff to stop execution of letters of horning proceeding on an extracted decree in absence pronounced by him.

Jan. 23. 1827.
1st DIVISION.
Ld. Corehouse.

CHRISTIAN M'LEAN brought an action before the Sheriff of Lanarkshire against the respondents, concluding for wages, on the ground that she had been hired as their servant, and had been illegally dismissed. The Sheriff having decerned in absence, the decree was extracted, on which she obtained letters of horning, and gave the respondents a charge. Before it expired, they presented a petition to the Sheriff, stating the circumstances, consigning the expenses, and praying to be reponed in terms of the statute 6th Geo. IV. c. 120, and relative act of sederunt.

The Sheriff-substitute of the Middle Ward thereupon stopped execution, and revived the action, as if the decree had not been pronounced. The respondents then obtained decree of absolvitor in absence, against which M'Lean (after the lapse of about three months) reclaimed, and contended that it was incompetent for the Sheriff to stop execution, because the diligence consisted not of his precept, but of letters of horning. The Sheriff-substitute, however, refused the petition, 'in respect that the act '6th Geo. IV. c. 120, § 43, enacts, 'That where a decree has "passed in absence in any Inferior Court, or in the Court of Ad- "miralty, and has been extracted, it shall be competent to apply to "the Court, in which such decree was pronounced, to have the "decree recalled; and on consignation in the hands of the clerk "of the Court of the expense incurred, the said Court shall have "power to stop execution, and repone the defender, and revive the "action, as if decree had not been extracted;' and in respect 'that, by the late Act of Sederunt relative to the form of processes 'in civil causes before the Sheriff Court, c. 18, § 3, it is enacted, "That when a decree has passed in absence, and has been ex- "tracted, but has neither been in whole nor in part implemented, "it shall be competent to apply to the Sheriff to have the decree "recalled, and on consignation in the hands of the clerk of Court "of the expenses incurred, the Sheriff shall have power to "stop execution, and repone the defender, and revive the action, "as if decree had not been pronounced or extracted;' and in re- 'spect that the respondents made consignation in the hands of 'the clerk of Court, and that although the petitioner has, at the '20th page of this petition, alleged that they had neither paid

'nor consigned certain expenses, which it was imperative on them 'to have either paid or consigned, yet she has not specified what 'these certain expenses are, nor the amount thereof, but has ad- 'mitted that they had consigned the sums in the charge, which 'was all they were bound to do; and in respect also that the 'charge on the letters of horning was given on the 19th day of 'June, but the interlocutor stopping execution, reponing the de- 'fenders, and reviving the action, was pronounced on the 3d day 'of July thereafter, so that the decree in absence could neither 'have been in whole nor in part implemented at the date of that 'interlocutor; and farther, in respect that that interlocutor had 'been nearly three months final before the petition was presented, 'and that the petitioner has shown no cause for her failure to 'reply.'

To this interlocutor the Sheriff-depute adhered 'for the reasons 'therein assigned, and upon the grounds set forth in a judgment 'pronounced by the Sheriff-depute at Glasgow in a similar case, 'and which is subjoined in a note hereto.' In the case alluded to, the Sheriff had found, 'that under the act of sederunt it is 'competent for the Court to recall a decree in absence, where the 'same has not been in whole or in part implemented, whether 'proceeding on a charge on the precept or decree, or on letters of 'horning, upon consignation in the hands of the clerk of Court 'of the expenses incurred.'

M'Lean then presented a bill of advocation, in which she argued the case at considerable length, but did not recite either the petition or the answers.

The bill having been passed, the respondents contended,

1. That as the advocation was brought of a final judgment, whereby they were assoilzied on the merits, the bill and letters were incompetent, in respect that they were argumentative, and did not set forth the petition and answers; and,

2. That the interlocutors of the Sheriff were warranted by the Judicature Act, and by the Act of Sederunt.

To this it was answered,

1. That as the advocation was brought on the ground that the Sheriff was not competent to repone the respondents, and to pronounce decree of absolvitor, the form of the advocation was perfectly correct, and sanctioned by the 50th Geo. III. c. 112, § 30, and the 45th section of the 6th Geo. IV. c. 120; and,

2. That although it is competent for a Sheriff to repone a party against his own extracted decree, and on which a charge has been given, yet he cannot do so where letters of horning have been raised, where the charge proceeds by virtue of them.

The case having come before Lord Corehouse in the Outer House, and his Lordship considering the question of competency of much practical importance, reported it to the Court, and stated that it appeared to him that the Sheriff could not competently stop the execution of letters of horning; that although the original decree was that of the Sheriff, yet, in order to obtain letters of horning, it was necessary that the authority of this Court should be interponed, and a decree conform pronounced; that it was upon that decree the letters were issued; and although the provision in the statute authorized the Inferior Judges to stop the execution of their own decrees, yet it conferred on them no such power as to those of the Court of Session, and therefore the interlocutors complained of were incompetent.

The Judges having concurred in this opinion, the Court instructed him to proceed accordingly.

ANDERSON and WHITEHEAD, W. S.—J. LOCKHART,—Agents.

No. 140.

D. J. BELL, Pursuer.—*D. of F. Moncreiff.*
J. GRAHAM, Defender.—*Jeffrey—Penney.*

Attorney's Certificate.—Circumstances in which decree was allowed to go out for expenses of a process conducted by an unlicensed attorney, who had afterwards taken out certificates under the 7th Geo. IV. c. 44.

Jan. 23. 1827.

2D DIVISION. Lord Mackenzie. B.

THE pursuer, Duncan John Bell, having been imprisoned by Graham on a warrant obtained against him from the Justices of Peace of Lanarkshire, but in which his name was by mistake inserted 'J. D. Bell,' instead of 'D. J. Bell,' raised an action of damages before the Magistrates of Glasgow, in which he obtained decree for £2, and was found entitled to expenses. The account of expenses then went to the auditor; and though no demand was made to allow decree to go out in the agent's name, Graham objected that the cause had been conducted on the part of Bell by Harvie, an unlicensed practitioner; and therefore, that as he could not compel Bell to pay him, Bell was not entitled to have a decree for expenses given out, which would either have the effect of increasing his damages, by enabling him to pocket what he was not obliged to pay to his agent, or of evading the statute by aiding the agent in obtaining payment indirectly of those expenses which he could not have sued for directly in his own name; and it was contended that even if Bell had actually advanced the expenses, (which was not alleged,) he was not entitled, by thus paying what could not legally be demanded of him, to subject his antagonist to a claim in which he could not other-

wise have been made liable. To get rid of this objection, a mandate was produced, dated at the time of raising the action, addressed to Goodwin, a licensed practitioner, by whom and Bell a petition was presented, praying to allow decree for the expenses to go out in his name as agent. This, however, was met by the plea, that under section 8th of the statute 25th Geo. III. c. 80, the same disqualifications extended to a licensed practioner lending his name to one not licensed, as attached to the unlicensed agent himself; and it was offered to be proved by Goodwin's oath, that the cause had truly been conducted by Harvie, and not by him.

The Magistrates then appointed Goodwin to depone; but he having failed to do so, the Magistrates pronounced a judgment holding him confessed, and sustaining the objections to the decree for expenses being allowed to go out. Bell then gave in a petition, admitting that Harvie was truly the agent, but stating that he had now taken out attorney certificates for the period embraced by the cause in question under the late statute, 7th Geo. IV. c. 44, which had a retrospective effect, and that all ground of objection was thereby removed. The Magistrates, however, refused his petition, and found him liable in the expenses of this discussion, amounting to the same sum with the damages awarded, which they accordingly found to be extinguished by this counter claim.

Both parties having advocated, the Lord Ordinary altered the interlocutor, repelled the objection founded on Harvie not having had a license, and found that Bell was entitled to his expenses in the Inferior Court. The Court adhered.

Pursuer's Authorities.—7. Geo. IV. c. 44; Barry, July 8. 1826, (ante, Vol. IV. No. 492.)

Defender's Authorities.—25. Geo. III. c. 80, § 7, 8; Robertson, June 29, 1826, (ante, Vol. IV. No. 466.)

J. HAMILTON, W. S.—CAMPBELL and MACDOWALL,—Agents.

C. CHRISTIE, Petitioner.—*Sandford.* No. 141.

Sequestration.—Authority refused to make up a new sederunt-book in place of the original, which had been lost; but warrant granted for re-examination of the bankrupt.

THIS was an application at the instance of Christie, trustee on Watson's sequestrated estate, setting forth, that after the examination of the bankrupt, the sederunt-book had been lost, and praying for authority to re-examine the bankrupt, and to make up a new sederunt-book from documents in possession of the petitioner.

Jan. 25. 1827.

2D DIVISION. B.

The Court granted warrant for re-examination, but refused the petition quoad ultra.

J. B. WATT, W. S. Agent.

No. 142. E. BEATTIE, Suspender.—*Jeffrey—Graham Bell.*
J. HALIBURTON, Charger.—*Bruce.*

Reference to Oath — Bill of Exchange. — Two obligants on a bill having brought suspensions of separate charges thereon, on the ground that an admitted payment by one of them was to account of the bill, and the charger having, on a reference by the one who had made the payment, deponed that it was not to account of the bill; the Court, in the suspension at the instance of the other obligant, refused to allow him to prove that the payment was to account of the bill, to the effect of getting rid of expenses in which they found him liable.

Jan. 25. 1827.

2D DIVISION. Lord Mackenzie. M'K.

BEATTIE, the drawer and indorser of a bill for £150 accepted by one Brown, having received a charge at the instance of Haliburton, the holder of it, for payment of the sum in the bill, 'deducting any payments' which Beattie or the acceptor might 'establish to have been made to account of the bill,' brought a suspension, on the grounds, 1. That the bill was vitiated by erasure in the place of payment; and, 2. That a partial payment of £50 had been made to account of the bill, by Brown the acceptor, shortly after it fell due. In his pleadings, however, he offered to give up the legal objection of vitiation, provided he was allowed credit for the alleged partial payment by Brown. This having been declined, the litigation went on; and in regard to the question of vitiation, the Court (ante, Vol. II. No. 202) repelled the objection, and remitted to the Lord Ordinary to hear parties further as to the allegation of partial payment. On this, Beattie paid £100 of the amount; and in regard to the partial payment of the remaining £50 by Brown, Haliburton admitted that, after the bill fell due, he had received from Brown £50; but he added the qualification, that 'besides the £150 in the bill 'charged on, Brown was due to the charger a considerable ba-'lance otherwise, which this payment was expressly meant to 'cover. As the balance was not correctly ascertained betwixt 'them, and as it was possible the £50 might exceed it by a 'pound or two, the respondent desired that the charge given the 'complainer should contain the saving words of any payments he 'or Brown could show were made to account.'

A few steps only had been taken before the Lord Ordinary under the remit, when Haliburton also charged Brown for payment, under deduction, in like manner, 'of any payments which

'the said William Brown and Ebenezer Beattie can establish 'to have made to account of the said bill.' Brown having thereupon presented a bill of suspension, on the ground of his alleged payment to account, the process with Beattie was sisted till this should be determined. This was speedily accomplished by a reference on the part of Brown to the oath of Haliburton, who deponed that the £50 had been paid in extinction of a then existing debt, consisting of a loan of £40 in cash, and of furnishings. Brown's bill was accordingly refused, and he was compelled to pay the balance of £50. Haliburton afterwards enrolled the process with Beattie, in order to crave a judgment for expenses against him. The Lord Ordinary, 'in respect it is admitted that the £50 in question has been paid by William 'Brown, found it unnecessary to proceed with any other points 'in the cause, except as to expenses,' and to these he found Haliburton entitled. Against this interlocutor Beattie reclaimed, and contended,

1. That the judgment in the question with Brown having proceeded entirely on the oath of Haliburton, emitted on the reference by the former, could not affect him, who had not concurred in that reference; and,

2. That Haliburton having admitted receiving a payment of £50 after the bill fell due, the presumption that it was in extinction of the bill could not be redargued by the qualification added to that admission, or at all events that he (Beattie) was entitled to disprove that qualification, agreeably to the principle laid down in the case of Anderson *v.* Rintoul, (ante, Vol. III. No. 346); and he offered to do this by the books of Brown and of Haliburton himself, and by the evidence of Brown, who had now no interest in the issue.

The Court unanimously adhered to the Lord Ordinary's interlocutor.

Lord Pitmilly.—I see no ground for interfering. The question now regards expenses merely. These were chiefly incurred in regard to the plea of vitiation; and as to the question whether the £50 was paid to account of the bill, Brown has referred it to Haliburton's oath, which is negative. Judgment has been pronounced accordingly, and the sum has been paid. The fact, therefore, has been determined in the question with Brown, and we cannot try it over again to settle the matter of expenses.

Lord Alloway.—If Beattie could allege that there had been any collusion with Brown, he might be allowed to try the question over again; but he cannot otherwise be permitted to do so.

LORD JUSTICE-CLERK.—I am entirely of the same opinion. It is now proved by Haliburton's oath that this was a just demand from the beginning, and Beattie must therefore be liable in expenses.

L. M'INTOSH,—J. TAIT, W. S.—Agents.

No. 143. C. RUSSELL, Suspender.—*D. of F. Moncreiff—Anderson.*
J. MACDONELL, Charger.—*Sol.-Gen. Hope—A. Wood.*

Jan. 26. 1827.
1ST DIVISION.
Bill-Chamber.
Lord Newton.
D.

THIS was a question as to passing a bill of suspension and interdict of a threatened sale by Macdonell of a property, for payment of the price of which he had become cautioner, and for relief of which he held a bond, with a power of sale, over the estate. The case was of a special nature; and the Lord Ordinary having refused the bill, the Court adhered.

H. MACQUEEN, W. S.—J. MACDONELL, W. S.—Agents.

No. 144. D. HUNTER, Advocator.—*Skene—Rutherfurd.*
Hon. W. MAULE, Respondent.—*Murray—Campbell.*

Possessory Judgment—Salmon-Fishing.—Circumstances under which a party was found not entitled to a possessory judgment as to right of salmon-fishing.

Jan. 26. 1827.
1ST DIVISION.
Lord Eldin.
H.

THE Hon. Mr. Maule presented a petition to the Sheriff of Forfarshire, stating that, by virtue of a Crown charter and instrument of sasine, he was proprietor of the estate of Panmure, with the baronies thereof, and salmon-fishings thereto belonging; that he had enjoyed the right of salmon-fishing along the whole line of the shore of the Tay from the western boundary of the parish of Barry to the point commonly known by the name of Buddenness, for a period of more than seven years; but that recently, when he and his tenants were peaceably exercising their right of fishing, the respondent, Mr. Hunter of Blackness, had by violence, and without recourse to law, interrupted them viâ facti. He therefore prayed to have it found that he was entitled to a possessory judgment, and that interdict should be granted against Mr. Hunter.

In defence Mr. Hunter stated, That he held a grant of part of the barony of Barry, 'cum piscationibus;' that by virtue of it his predecessors had exercised the right of fishing salmon for many years, and that it had only been given up during his minority, and while he was under the guardianship of Mr. Maule; that the lands in the parish of Barry, belonging to Mr. Maule, did not form part of the barony of Panmure, and he had produ-

ceed no title to a substantive right of fishing ex adverso of these lands, which was essentially necessary, as they did not constitute part of a barony; that, further, he was not proprietor of all these lands, but that that part of them, to the fishing ex adverso of which he claimed right, belonged to Mr. Hunter, and formed part of the barony of Barry; and that, so far from having exercised such a right of fishing opposite to these lands, Mr. Maule had expressly excluded them in his lease of his fishings on the river Tay, and he had not enjoyed seven years possession.

The Sheriff, after allowing a proof to the parties 'of their re-'spective allegations as to the possession of the salmon-fishing in 'dispute for the seven years immediately preceding the interrup-'tions complained of in the petition,' and after having inspected the fishing-ground in dispute, found 'that the pursuer has estab-'lished that he has possessed the fishings in question, as proprie-'tor thereof, without interruption, for the seven years imme-'diately preceding the interference of the defender, complained 'of in the petition; that, in these circumstances, it was illegal in 'the defender to dispossess the pursuer of said fishings brevi 'manu, as attempted by the defender;' and therefore granted interdict.

Mr. Hunter having brought an advocation, the Lord Ordinary found, 'Primo, That in this action it was incumbent on the pur-'suer to produce an ex facie title to the salmon-fishings claimed 'by him ex adverso of the advocator's lands; that no such title 'has been produced, and therefore the present action, in which a 'possessory judgment is demanded, and in which a title to fish 'ex adverso of the advocator's lands is founded on, but not pro-'duced, cannot be maintained. Secundo, et separatim, That the 'pursuer has not established that he, by himself and his tenants, 'has enjoyed and possessed the salmon-fishings in dispute ex ad-'verso of the advocator's lands without interruption, and con-'stantly and exclusively, for seven years previous to the alleged 'interruptions complained of in the original petition to the She-'riff. Tertio, That although such possession had been estab-'lished, the pursuer could not in point of law be entitled to 'found upon it, to the effect of entitling him to a possessory 'judgment, in respect he has produced no title to which the pos-'session could be ascribed, and in respect the advocator was his 'ward during the period to which the alleged possession applies. 'Further, that the salmon-fishings ex adverso of the advocator's 'lands were not let by the pursuer to his present tenant, whose 'possession is alleged to have been interrupted, but were excepted 'by the lease, which is dated the 23d October 1824, and 13th

'January 1825, and which expressly declares that it was meant 'to include the whole fishings 'upon the shore of the lands be- "longing to the said William Maule,' within the limits specified, 'but was 'not meant to include the fishings upon the shore of "any lands belonging to any other proprietor whatever.' That 'while it has not been alleged that the advocator attempted to 'fish upon the shore of the pursuer's lands, so, on the other hand, 'the pursuer's tenant was not entitled by his lease to fish upon 'the shore of the advocator's lands. And with respect to the 'general allegation in the original petition, that the advocator, or 'those acting for him, did by violence interrupt the pursuer's 'fishing, finds that this allegation has not been proved;' and therefore advocated the cause, and assoilzied the defender, 're- 'serving to the pursuer to establish a right to the salmon-fishings 'ex adverso of the advocator's lands by declarator, and to the ad- 'vocator his defences to such action, as accords.'

The Court, without hearing the counsel for the advocator, unanimously adhered.

A. PEARSON, W. S.—FOTHERINGHAM and LINDSAY, W. S.—Agents.

No. 145. W. F. WALKER, Pursuer.—*D. of F. Moncreiff—Hamilton.*
EARL of EGLINTOUN'S TUTORS, Defenders.—*Jameson.*

Process—Execution—Presumption.—Held, that there being evidence of a summons having been called, it was to be presumed, after the lapse of a long period of time, that it had been duly executed.

Jan. 26. 1827.
1st DIVISION. Lord Eldin. S.

IN 1770 Major Ilay Ferrier as liferenter, and James Ferrier, Writer to the Signet, as fiar of the superiority of the lands of Middleton and others, brought an action of declarator and non-entry against Jean Countess Dowager of Craufurd, as apparent heir of the late James Montgomery, or of Patrick Montgomery, the party last vest and seised in the fee of the lands. On the back of this summons there was a jotting, apparently by the messenger, in these terms:—'Ex. Sixth March. Witts. J. Suthd, 'A.ffmen; cross, pier, and shore, A. M.' No execution, however, was written on the summons itself, but on the partibus there was a marking in these terms:—19th July 1777. Act. Ilay Campbell.—Alt. absent.—To the Regulation Roll, H. C.—A. D.

Thereafter Alexander Walker, Writer to the Signet, having acquired right to the superiority, raised a summons of wakening, and on the back of the original summons the following procedure was minuted:—

'16th January 1805.—Lord Armadale.—*Cranstoun* repeats 'this libel, and also resumes a summons of wakening thereof at 'the instance of Alexander Walker of Middleton, writer in Edin- 'burgh, the now superior, against the right honourable Jean 'Countess of Craufurd, and craves his Lordship to find, de- 'clare, and decern, in terms of the libel at Mr. Walker's in- 'stance.'

'*Boyle*, for the Countess of Craufurd, craves to be allowed to 'see the process, and a few days to prepare defences against the 'action.

'Allows the defender, the Countess of Craufurd, to see the 'process; ordains her to give in full defences quam primum, 'and parties' procurators to be ready to debate against next 'calling.'

No further procedure occurred; and Mr. Walker having died, his son, the present pursuer, in 1824 raised a summons of waken- ing and transference against the Earl of Eglintoun and his tu- tors and curators, as representing the late Countess of Craufurd, and concluding to have the original summons wakened and trans- ferred against them. In this summons it was stated that the original one was called in Court upon the 19th day of July 1777; but no further proceedings were had therein, owing to a submis- sion having been entered into by the parties to the late Lord President Campbell.

In defence it was pleaded, that there was no evidence that the original summons had ever been executed, or that it had ever been enrolled; and as it therefore had never become a de- pending action, and as more than forty years had elapsed from its date, the claim of the pursuer was excluded by prescription.

The Lord Ordinary repelled the defence, 'that the execution 'of the summons sought to be wakened and transferred has not 'been produced, in respect that it appears from the writings in 'process that the said summons was executed, called in Court, 'enrolled, and avizandum made with it by the Lord Ordinary.'

Lord Eglintoun and his tutors having reclaimed, the Court, considering the question as one of importance and difficulty, ap- pointed the pursuer, before answer, 'to give in a condescendence 'explanatory of the practice, at the period in question, relative to 'the calling of summonses before this Court, and whether the 'executions, if on separate papers, were required to be produced 'to the clerk along with the summonses at the period of the 'calling; as also what evidence exists of the enrolment of the ac- 'tion.' The pursuer, however, afterwards gave in a note, stating that he found it impossible to comply with this order, and praying

their Lordships to dispense with the condescendence, and to do otherwise as they thought proper.

The Court then adhered to the Lord Ordinary's interlocutor.

LORD PRESIDENT.—We have evidence from the partibus that the summons was called, and we must therefore presume, post tantum temporis, that every thing was rite et solemniter actum, and consequently that the executions either were produced, or ready to be produced.

The other Judges concurred.

J. CAMPBELL Jun. W. S.—TOD and HILL, W. S.—Agents.

No. 146. P. BORTHWICK, Suspender.—*Fullerton.*
Mrs. URQUHART, Charger.—*Sol.-Gen. Hope.*

Jan. 26. 1827.
1ST DIVISION.
Bill-Chamber.
D.

Husband and Wife.—BILL of suspension passed simpliciter of a charge by a married woman, without the concurrence of her husband, and for payment of a sum of money, as to which it was alleged that his jus mariti was excluded.

W. COOK, W. S. Agent.

No. 147. MACRITCHIES and MURRAY, W. S. Pursuers.—*Sol.-Gen. Hope —L'Amy.*
J. YOUNG and Others, Defenders.—*Cockburn—Penny.*

Process—Joint Obligants.—An action which had been brought by an agent of one of three parties, for repayment from them all of certain advances for which they were liable, sisted, so far as the amount of one of the shares was disputed, till the relative proportion of each should be determined in a process of relief pending between the co-obligants themselves.

Jan. 26. 1827.
2D DIVISION.
Lord Mackenzie.
F.

IN an action at the instance of MacRitchies and Murray, writers to the signet, agents for the City of Edinburgh, against the Magistrates as Governors of Heriot's Hospital, and Young and others, as trustees and representatives of the partners of Winton and Company, for payment of certain advances made by them in regard to an extensive drain executed in certain proportions, for the mutual advantage of these three parties, the Lord Ordinary pronounced an interlocutor decerning against Young and others for the proportion libelled in the summons, without prejudice to any claim of relief they might have against the City or Heriot's Hospital. Against this interlocutor Young &c. reclaimed, on the ground that it burdened them with a larger proportion than they were truly liable for; and at the same time they raised an action of relief

against the City and the Hospital. The Court recalled the interlocutor of the Lord Ordinary, and remitted to his Lordship to grant interim decree for the proportion admitted to be due; but, quoad ultra, to sist process till the different proportions of the parties should be determined in the action of relief.

MACRITCHIES, BAYLEY, and HENDERSON, W. S.—MORISON and BURNETT, W. S.—Agents.

EARL of ELGIN and KINCARDINE, Pursuer.—*Sol.-Gen. Hope—Thomson—Robertson.* No. 148.

Mrs. MARY HAMILTON NISBET FERGUSSON and HUSBAND, Defenders.—*D. of F. Moncreiff—Fullerton—Skene.*

Husband and Wife—Divorce.—A party having married the heiress presumptive of an estate, the entail of which excluded the jus mariti, and having in his contract of marriage settled certain additional provisions on the children of the marriage, payable in the event of the succession of her or the heir of the marriage to this estate, in which event also an additional tocher stipulated to him was not to be exigible, and having divorced her on the head of adultery, after which the succession to this estate opened to her—Held,—1.—That he had no claim to the rents and administration of the estate, either by law, or by virtue of the contract of marriage; —2.—That his claim was not made better by his having raised an action in name of one of his children, a substitute heir of entail, to set aside the deed excluding the jus mariti, as in contravention of a prior entail, which, however, contained an exclusion of the courtesy;—3.—That he was not entitled to relief of the additional provisions to his children;—4.—That he was not entitled to demand the additional tocher;—5.—That no claim of damages lay against his divorced wife;—and,—6.—That it was incompetent for him to conclude against her for aliment to the children of the marriage, who, with the exception of one, had attained majority.

Jan. 26. 1827.

2D DIVISION. Lord Mackenzie. M'K.

BY deed of entail executed in 1701, John Lord Belhaven and Stenton settled his estate of Beil or Belhaven on a certain series of heirs, under various restrictions and conditions, among which were a prohibition to alter the order of succession, or to possess the lands on any other title than the entail, and a declaration 'that neither the relicts nor husbands' of the male or female heirs 'surviving them shall have right to any terce or courtesy of the 'said lands and others above specified, or any part thereof, but 'shall be altogether hereby excluded therefrom, notwithstanding 'of whatsomever law or practice to the contrair.' In 1765 James Lord Belhaven, grandson of the entailer, setting forth that, all the other male substitutes having failed, the estate would on his death devolve on females, executed a new disposition of entail in favour of the same series of heirs, and under the same conditions &c. as were contained in the deed 1701, with this additional restriction, that it expressly excluded the jus mariti of the husbands of heirs-

female, as well as their right of courtesy. No infeftment followed on this deed; and upon the death of James Lord Belhaven, the succession opened to Mrs. Mary Hamilton of Pencaitland, (widow of William Nisbet of Dirleton,) who in 1784 executed a third deed of entail, whereby she disponed to herself and the heirs in the previous deeds the estate of Beil or Belhaven, and certain other lands not contained in the entail of 1701, under all the conditions and provisions of the tailzie of 1765, and particularly those regarding the exclusion of the jus mariti of the husbands of heirs-female. Mrs. Hamilton completed her titles by charter and infeftment under the last deed, which, along with that executed in 1765, was duly recorded in the register of tailzies. Mrs. Hamilton was succeeded by her son, the late Mr. Hamilton Nisbet, who made up titles in virtue of the entail 1784, and under this investiture he held the lands in 1799, when the pursuer Lord Elgin contracted a marriage with his only child, the defender, then Miss Mary Nisbet. By the antenuptial contract of marriage entered into between these parties, Lord Elgin settled on his wife, in the event of her survivance, an annuity of £1500 a year, to be suspended by the succession of her, or the issue of the marriage, to the estate of Belhaven. His Lordship further destined his estate, which he held in fee-simple, to the heirs-male of the present marriage, whom failing, to the heirs-male of any subsequent marriage, whom failing, to his heirs and assignees whomsoever; and he settled on the younger children £5000 if one, £7000 if two, and if three or more, the sum of £10,000; which provisions were to be doubled 'in the event of an heir of this marriage succeeding both 'to the aforesaid lands,' (his Lordship's own estate,) 'and to the 'estate of Belhaven.' On the other hand, Miss Nisbet and her father conveyed to his Lordship £10,000 as a marriage portion; and Mr. Nisbet bound himself and his heirs to pay a further sum of £10,000, which, however, was not to be exigible in the event of his daughter succeeding at his death to the estate of Belhaven. Of this marriage there were born one son and three daughters, (all of whom are alive, and three of them major); but in 1808, on the suit of Lord Elgin, it was dissolved by decree of divorce on the head of adultery committed by the defender with Mr. Fergusson, whom she afterwards married, and against whom his Lordship obtained decree in an action of damages for the sum of £10,000.

In 1822 Mr. Hamilton Nisbet died without leaving any other child, and the succession to the estate of Belhaven opened to the defender, now Mrs. Fergusson, who made up titles as heir to her father under the entail 1784, and entered into possession of the

property. Lord Elgin then instituted the present action, and at the same time raised a summons of reduction in name of his youngest daughter, Lady Lucy Bruce, a minor, as one of the heirs of entail under the deed 1701, and of himself for his interest, to have the entails of 1765 and 1784, and the investitures following thereon, set aside, as in contravention of the deed 1701, in so far as they imposed the restriction regarding the exclusion of the jus mariti, which was not contained in the original entail; but no procedure was had in this process, nor was it conjoined with the present action, which contained various separate and alternative conclusions.

I. The first conclusion was, that, independent of the terms of the contract of marriage, 'the pursuer, notwithstanding of the 'said divorce, has a good and undoubted title, jure mariti, to the 'rents of the said lands and estate of Beil or Belhaven and others, 'and that he is entitled to draw the same, and to the administra-'tion of the said estate, in the same way and manner as if the 'said divorce had never taken place, and that from the period of 'Mrs. Fergusson's succession, during all the days of the joint 'lives of the pursuer and defender;' and in support of this conclusion it was pleaded,

1. By the law of Rome, (on which that of Scotland in relation to this matter is founded,) the effect of divorce on the head of adultery was, that the offending party forfeited both the dos and the donationes propter nuptias, (Nov. 117. c. 8. Voet. t. 8. § 11.) The dos among the Romans was not equivalent to the Scottish tocher, but was that part of the wife's property which fell under the jus mariti, all her other property being strictly paraphernal; and it also formed her provision at the dissolution of the marriage, (Dig. de Jure Dotium; 1. Stair, 4. 11.) In the ordinary case, therefore, the offending wife only forfeited the dos; but if she had constituted her whole property as dos, (which she might do, l. 4. C. l. 72. D. de Jure Dotium,) she forfeited her whole estate, (Hein. p. 4. § 29; Pothier de his qui sui, &c. art. 4. § 3.) By the law of Scotland, the jus mariti extends over the whole of the wife's moveables, and over the rents of her heritage, and the husband's right to these stands in the same situation in regard to divorce as his right among the Romans to the dos; that is to say, all these rights which fall, as the Roman dos did, under the jus mariti, are forfeited by the offending wife, (1573, c. 55; 1. Stair, 4. 26.)

2. The supposed rule, that the consequences of divorce are the same as if the offending party were naturally dead, is founded solely on a mode of expression, true as to some effects of divorce,

being loosely repeated as to all, while in reality the effects are totally different, and rest on different principles. By dissolution in consequence of death, each party and their representatives succeed to their respective rights and provisions, and their share of the goods in communion; while, in the case of dissolution by divorce, the offending party not only loses all claims consequent to marriage, but forfeits all rights vested by the marriage in the innocent spouse, as, in the case of an offending wife, the tocher and share of the goods in communion.

3. It being the law that the offending party forfeits all rights vested by the marriage in the innocent spouse, the question comes to be, what is vested in the husband by the marriage? All moveables are undoubtedly carried by force of the marriage, and would be forfeited by divorce on the head of the wife's adultery. But the liferent of her landed estates is assigned to the husband by the marriage equally with the property of her moveable estate. The nature of the right so acquired by the husband is not, that it attaches to each year's rents as they become due; but it extends to the whole period of his wife's lifetime as an unum quid; and the ipsum jus mariti, so far as regards this right, may be adjudged to the complete exclusion of any subsequent diligence or conveyance. This right no doubt falls by the death of the wife, in the same way as the right to her share of the goods in communion; but, like that also, it does not fall, but is necessarily forfeited to the husband upon the divorce of the wife for adultery; and so it was found in the old case of L. Innerwick, March 1589, (M. 329.) Accordingly, if it were adjudged by her husband's creditors, she could not vacate their just and onerous rights by her own delict; nor, in like manner, can she vacate the rights of the husband himself, which are equally onerous, and possessed in virtue of a contract which he has not violated, but which has been broken on her part only.

4. This legal assignment of all moveables belonging to the wife, and of the liferent of her heritage, is not confined to rights falling to her during the marriage, but extends to property to which she succeeds after its dissolution. Thus it has been found that legacies to a wife, not payable till her husband's decease, go to his executors, as falling under his jus mariti, (Nicolson, June 16. 1627, M. 5798; Lady Pulteney, Dec. 18. 1807,) as does a sum assigned to the wife, but not intimated till after the husband's death, (Scott, Jan. 29. 1663, M. 5799); and even as to a contingent debt, the condition attaching to which does not exist till the dissolution of the marriage, it is at least a doubtful matter whether it also does not fall under the jus mariti, (Dirleton, voce Jus Mariti.) Such being the case

even where the dissolution happens by death, it must much more clearly be so where the dissolution happens by divorce; for the party can never by her delict deprive her husband of rights which he would have enjoyed, notwithstanding her natural death; nor can she gain to herself an advantage by this breach of the contract, so as to acquire rights, or deprive her husband of rights which he must have enjoyed, had the contract not been violated on her part, and necessarily dissolved by her delict, prior to her succession to such rights as her husband must and would have enjoyed jure mariti, had the marriage not been so dissolved. But further, the right in the defender to the estate of Belhaven, though a future right, and perhaps to a certain extent a contingent right, was yet a right absolutely vested in her person as heir of entail at the date of the marriage; and although the succession did not open until after the dissolution of the marriage, it did open during her life, and therefore in such time as would have brought it under the jus mariti of her husband, had the marriage not been dissolved by her delict; and as she could not, by a culpable breach of contract, gain to herself, or take away from her husband, a right which she would not have acquired by a strict performance of the contract, she consequently cannot, on any principle of law or equity, claim the exclusive possession of the rents of an estate which she would not have been entitled to possess, had she faithfully performed her part of the contract, and not violated it by a delict.

5. The circumstance of the exclusion of the courtesy in the entail of 1701 of the estate of Belhaven cannot affect this claim, as it is not rested on courtesy, but on the jus mariti, which the defender could not defeat, to her husband's prejudice and her own advantage, by her delict and culpable breach of the contract; and besides, courtesy in the ordinary sense has reference only to the case of the wife's death, and an exclusion of it cannot affect a right of enjoyment before that event has happened, the more especially in the present case, as the clause in the entail expressly mentions the event of the *survivance* of the husband.

6. The exclusion of the jus mariti in the entails of 1765 and 1784 might no doubt have been a complete bar to the pursuer's claim, had it not been that the insertion of this additional restriction was ultra vires of the makers of these entails, as being in contravention of the prior deed of 1701, in virtue of which they held the estate, and that an action of reduction of these deeds had been raised at the instance of one of the substitute heirs under the deed 1701.

II. The second conclusion of the pursuer's summons was, that

'in case it shall be held that the legal consequence of the said di-'vorce is to exclude his jus mariti over the rents of the said lands 'and estate, and right of administration thereof, during the joint 'lives of the parties,' it should still be declared that his claim was well founded, in respect of the special provisions in the contract of marriage, and this on the ground that the obligations come under to settle his fee-simple estate on the heir-male of the marriage, and to double the provisions of the younger children in the event of the succession to Belhaven opening to his wife, were undertaken by him in consideration of his wife's expected succession to that estate, and in contemplation of drawing the rents as a fund for enabling him to make these provisions in favour of the children of the marriage, and therefore that the defender could not by her delict deprive the pursuer of the onerous consideration in respect of which he came under these obligations.

III. The summons, in the third place, concluded, that in the event of the pursuer failing in the two previous conclusions, the defender should be found liable to relieve him of the obligations so come under by him in consideration of his wife's expected succession to the estate of Belhaven, and also to make payment to him of £10,000 'as a solatium, and in name of damages, arising 'from the consequences of the said decree of divorce, and for the 'loss suffered by the pursuer in consequence of the effect of the 'said decree upon his right to the said rents, either jure mariti, 'or under the said contract of marriage, or in any other way.'

IV. A fourth conclusion related to the additional tocher of £10,000 stipulated by Mr. Hamilton Nisbet in the contract of marriage, but under the declaration that it should not be exigible, 'if the said Mary Nisbet, or her issue by the present marriage, 'shall, at the death of the said William Hamilton Nisbet, succeed 'to the estate of Belhaven, as heir of the investiture thereof;' and its purpose was to have it declared, in the event of the pursuer's claim for the rents being repelled, that the defender was bound to make payment of this sum, in respect that 'in consequence of 'the said divorce, arising from her delinquency, the pursuer does 'not draw the advantages arising from her said succession, in 'consideration whereof the said sum of £10,000 was, in that 'special event, declared in the said contract of marriage not to be 'exigible.'

V. The fifth and last conclusion was, to have it found that the defender 'is bound to contribute out of the rents of the said estate 'of Beil or Belhaven, in case it should be found that the pursuer 'has no right thereto, or out of her own other funds, or out of 'both the said rents and funds, a proportional part of the expense

'of maintaining and supporting the children procreated of the 'marriage contracted betwixt her and the said pursuer, suitable 'to their rank, station, and prospects.'

The Lord Ordinary, on advising mutual memorials, found 'that sufficient grounds are not stated to support any of the con-'clusions of the libel,' and therefore assoilzied the defenders simpliciter. The Court unanimously adhered.

LORD PITMILLY.—Although the claims on the part of the pursuer are urged in a paper of very great length, our opinions may be delivered very shortly. I had not proceeded very far in the perusal of the memorial, when I came to be of the same opinion with the Lord Ordinary. As to the first conclusion, it is altogether groundless, even if the jus mariti were not excluded by the titles. I cannot conceive how he could possess any jus mariti after the dissolution of the marriage, as he would thus have right to the liferent of the heritage on two inconsistent grounds—courtesy and jus mariti. But at all events it is cut off by the existing investitures, which exclude the jus mariti. As to the reduction, it is enough to say that a reduction is necessary; and until the titles be reduced, they must exclude the jus mariti. The second conclusion assumes that the pursuer became bound for the provisions, on the faith of getting the rents of Bellhaven. The answer to that, however, is quite invincible. The contract never could contemplate this as the onerous cause of the provisions, as the jus mariti was excluded; and besides, it is not the event of the lady, but of the heir of the marriage succeeding, which is the condition of the increased provisions. The conclusion for damages is just another shape for the same claim, and the same answer applies, as it does also to the fourth conclusion. The last conclusion for aliment cannot possibly be sustained in an action where the children, being major, are not parties, and do not require aliment.

LORD ALLOWAY.—I am entirely of the same opinion. As to the first conclusion, I cannot conceive on what it is founded. The jus mariti rests on the subsistence of the marriage; and how is it possible that it can be exerted after its dissolution, and over a subject which the lady did not succeed to for fifteen years after the marriage had been dissolved by the husband's voluntary act? If, however, there could be any doubt on the general point, it would be completely removed by the specialty, that at the date of the marriage the estate stood on an investiture excluding the jus mariti;—and will the mere raising an action of reduction have the same effect as if decree had been obtained in it? The title to pursue is not yet sustained; and I should conceive it to be a very difficult matter to make out any interest in Lady Lucy Bruce to set aside an entail which gives her a right to succeed to considerable estates not contained in the original entail, and to which she would have no right otherwise. The conclusion for damages is still less capable of being supported. The exclusion

of the jus mariti removes every foundation for it; and besides, the pursuer brought himself into his present situation by his own act and deed in pursuing a divorce. On the other points I entirely concur with Lord Pitmilly.

Lord Justice-Clerk.—In this unusual and unparalleled case, I confess my difficulty was more in the perusal of the papers than in forming an opinion. I lay out of view altogether the action of reduction, and consider the case as under the existing investitures, and I am satisfied that there are no grounds on which to rest any of the conclusions of this summons. As to the claim on the jus mariti for the rents of lands not succeeded to until long after the dissolution of the marriage, I conceive it to be a contradiction to found on the jus mariti after dissolution of the marriage; but at all events, if there were any doubt on the general argument, it is entirely precluded by the exclusion of the jus mariti in the existing investitures. In regard to the second conclusion, I can find nothing in the contract giving such a right as here claimed over the estate, which was then under investitures excluding it. The third conclusion is for damages in consequence of the divorce. I never heard of such a claim, further than the penal consequences which have already followed. The fourth is just a claim of damages under another shape; and as to the fifth, for aliment to the children, although it may at first sight appear more plausible than the others, it is equally untenable when we attend to this, that it is insisted in by the father of children all major but one, who is also near majority, and not in name of the children. It is just in the same situation as an action by an entire stranger, and there are no grounds for sustaining it.

Pursuer's Authorities.—I.—(1. and 2.)—Novell. 117, c. 8; Voet. 48. 1. 5. § 11; 1. Stair, 4. 20. § 11; l. 4. C. and l. 72. D. de Jure Dotium; Hein. p. 4. § 59; Pothier, Art. 4. § 3, de his qui sui, &c.; Græneiwegan de Leg. Abrog. Art. Nov. 117; Christinæus ad Leg. Mechlin. t. 2. Art. 13. Ad. 6; 2. Craig, 22. 35; 1. Erak. 6. 46; Auchinleck, Dec. 18. 1540, (339); L. Innerwick, March 1589, (329); Countess of Argyll, Dec. 19. 1573, (337); Murray, June 16. 1575, (328); Lady Baquhanan, May 16. 1579, (329); 1573, c. 55.—(4.)—Nicolson, June 15. 1627, (5798); Scott, Jan. 29. 1663, (5799); Lady Pulteney, Dec. 18. 1807, (F. C.); Corrie, Feb. 27. 1765, (5772); Fotheringham, Feb. 7. 1695, (5764); Dirleton, voce Jus Mariti.—(6.)—Dundas, Nov. 29. 1774, (15430); Menzies, June 22. 1785, (15436.)

Defenders' Authorities.—1. Stair, 4. 22; 4. Wallace's Pr. 15. 287; Lady Manderstoun, March 21. 1637, (1741); Anderson, Feb. 8. 1734, (333); Justice, Jan. 13. 1761, (334); Wedderburn's Trustees, Jan. 29. 1789, (10426.)

J. A. Cheyne, W. S.—J. Dundas, W. S.—Agents.

D. MUNRO, Suspender.—*D. Macfarlane.*
Mrs. E. M'NEILL.—*Robertson.*

No. 149.

Jan. 27. 1827.
2D DIVISION.
Bill-Chamber.
Lord Alloway.

THE Court adhered to an interlocutor of the Lord Ordinary refusing a bill of suspension of a charge on decree by a widow against her deceased husband's trustees, for payment of an annuity left her by her husband.

J. DUNLOP, W. S.—J. BROWN,—Agents.

A. FARQUHARSON, Pursuer.—*D. of F. Moncreiff—Skene—Innes.*
Miss BARSTOW, Defender.—*Cockburn—Cuninghame.*

No. 150.

Usury—Personal Objection.—1.—A party held barred from objecting to a deed as illegal on the head of usury;—and,—2.—A sale of Government stock of the value of £7620 for an heritable bond of £10,000, and interest thereon at five per cent., and of which the principal sum was to be payable only on certain contingencies, held not usurious.

Jan. 31. 1827.
1ST DIVISION.
Lord Medwyn.
D.

IN 1797 the defender Miss Barstow came to reside with the late Francis Russell, Esq. of Blackhall, (of whose wife she was a cousin,) and continued to form one of the family during his life, paying a board, and contributing to the expenses of part of the domestic establishment, and occasionally giving Mr. Russell the use of her funds. She was possessed of £12,000, 3 per cent. consols; and early in the year 1803 she agreed to transfer that stock to Mr. Russell, in consideration of receiving from him an heritable bond for £10,000 sterling, with interest on that sum at 5 per cent.; but declaring that she should not be entitled to exact payment of the principal sum until the 3 per cent. consols had been purchased by the broker for redemption of the national debt to the extent of one million in the course of a year. At this time the value of the £12,000 of stock was £7620, the selling price being 63¼. This agreement was explained in mutual letters, dated the 16th of March 1803, of which that from Mr. Russell was in these terms:—

'If I am ever to complete our stock bargain, it shall be now.

'I induced you to embark in that business. I am able, and I 'am willing, to abide the consequences, and I do not fear them 'in the least; so now or never.

'I think the following are the articles hitherto agreed between 'us:—

'1st, On your part, you are to assign over to me, in full right 'for ever, your right and interest in £12,000, 3 per cent. con-

'solidated Government annuities, with the dividend accruing due 'thereon in July next, 1803 years, as part of the same.

'2dly, On my part, I am bound to give you, and your heirs 'or executors, ample mortgage security for the sum of £10,000 'sterling money of Great Britain, as on the 20th day of June 'next, 1803 years, with interest from and after that day and term, 'during the whole period I shall be due the said sum of money, 'at the rate of 5 per cent. per annum, payable half yearly, every '20th day of December and 20th day of June, for the half year 'respectively preceding; beginning the first half yearly and 'termly payment upon the 20th day of December next, 1803 'years, for the half year immediately preceding, and so on half 'yearly, paying to you £250 sterling every half year while I 'remain debtor in the said principal sum of £10,000 sterling.

'3dly, That, during your life, I shall, at your pleasure, be 'bound to hold the said sum of money, and to pay you interest 'therefor at the rate of 5 per centum yearly, and payable as 'above half yearly in equal portions, and that unless the interest 'of money shall be reduced by law to a lower rate.

'4thly, That it shall not, however, be lawful for you to de- 'mand or exact payment of the said principal sum from me or 'mine until two years after it shall be signified to me by a writ- 'ing under your own or your agent's hand, that the said 3 per 'centum consolidated Government annuities are currently sold 'at the Stock Exchange in London to the broker for purchasing 'up the national debt, or other public character, in sums exceed- 'ing in the course of a year one million of said stock, at the rate 'of £83. 10s. sterling for each £100 of said 3 per cent. consoli- 'dated annuities; but that, in six months after I have received 'said notice, it shall be lawful for you, at any time during the 'whole course of your life, to demand, and I shall be bound to 'pay up, the whole of said principal sum.

'5thly, But that it is fully agreed and settled between us, 'in the event of the said principal sum remaining due at the time 'of your decease, or of mine, that no greater part of said princi- 'pal sum than £2000 sterling shall be payable or demanded in 'a shorter period than two years thereafter; and that the re- 'maining £8000 shall be payable in two equal instalments of '£4000 each at the periods, the first of four years from such 'event, and the last at six years from such event; and that it 'shall not be in the power of either your heirs or executors or 'successors to demand payment in any shorter or other terms 'or portions.

'6thly, That in the case and event of your marriage, I shall,

'in one month thereafter, be bound to pay you £6000 sterling, 'provided the 3 per cents. have reached but 75 per centum; and 'that at all times, on forty days notice, I shall be bound to pay 'you, for any want or purpose of yours, £1000 sterling, on 'either of such payments being properly discharged, in part of 'my bond and mortgage in your favour.'

On the 21st of the same month, Miss Barstow wrote an answer, introducing the conditions of the above letter, and then stated, that 'I have only to declare that the above-written arti-'cles of an agreement are entirely agreeable and in conformity 'to what has been settled between us; and I hereby oblige my-'self to execute what is incumbent on me, in consequence of this 'agreement, by assigning the £12,000 3 per centum consols in 'your favour, as soon as a proper security can be made out and 'executed by you in my favour, in the terms of your letter above 'referred to. And as the said 3 per cent. stock does not at this 'time sell above 68¼ per cent., I cannot but consider this trans-'action as much to my advantage; and therefore in case, at the 'period of my decease, the said bond shall remain unpaid, it is 'my desire and request that thereafter, until it shall sell so as 'that the said £12,000 shall yield the sum of £10,000 sterling, 'that it shall remain in your hands at the rate of 3½ per centum 'until that price can be obtained.'

In consequence of this arrangement, Mr. Russell (who had been educated as a lawyer, and had passed advocate) drew out an heritable bond, which he himself extended and executed in due form, and obtained a transfer to the stock, without the intervention of agents on either side. This bond was precisely in terms of the above missive, with the exception that the obligation to repay was thus expressed:—'Therefore I hereby bind and 'oblige myself &c. to content and repay to the said Miss Frances 'Barstow, or to the executors and trustees now appointed or to 'be appointed by her for carrying into execution the disposal of 'her property and effects at her decease, either by her last will or 'settlement now actually made, or by any latter will or settle-'ment which she may at any future period of her life think fit to 'make, expressly barring and secluding all other heirs and all 'other executors, the said sum of £10,000 money aforesaid.'

In place also of Mr. Russell being absolutely obliged to pay £6000 on her marriage, if the 3 per cent. consols should then reach 75 per cent., he bound himself under this qualification:—'The sum of £6000 sterling to be credited to me, however, in 'the payment of the sums contained in this bond, at the rate at 'which the 3 per cent. consols shall then sell; that is, allow-

'ing in my favour whatever they then sell for below £83. 10s. 'for £100 stock.'

The bond was delivered to Miss Barstow, but no infeftment was taken upon it till after the death of Mr. Russell, which occurred in October 1806. That gentleman conveyed his estates to his wife as sole trustee, who was empowered, after paying his debts, to divide them between his two daughters, who were his only children. One of these daughters was married to the pursuer Mr. Farquharson, who acquired right to that part of the estate over which the bond extended. He continued to pay to Miss Barstow the interest, in terms of the agreement, till March 1824, and during the greater part of the intervening period, (at least till the year 1817 or 1818,) the 3 per cent. consols never reached 83¼, but more recently they exceeded that price. He then brought an action of reduction of the transaction, on the ground,

1. That it was usurious; because, as the sum actually advanced and lent was only £7620, in consideration of which a bond was granted for £10,000 at five per cent., so that instead of drawing the legal interest of £381 on the sum truly lent, she was entitled to £500 per annum, whereby she drew £119 more than she was entitled to; and because the repayment of the principal sum was absolutely secured to her; or at least, if there was any contingency whatsoever, it was merely colourable; and,

2. That the transaction was contrary to the 7th Geo. II. § 1, by which it is enacted, that 'all contracts and agreements whatso-'ever which shall, from and after the 1st of June 1734, be made 'or entered into by or between any person or persons, upon 'which any premium shall be given or paid for liberty to put 'upon, or to deliver, receive, accept, or refuse any public or joint 'stock, or other public securities whatsoever, or any part, share, 'or interest therein, and also all wagers, and contracts in the na-'ture of wagers, and all contracts in the nature of puts and re-'fusals relating to the then present or future price or value of 'any such stock or securities as aforesaid, shall be null and void 'to all purposes whatsoever.'

On the other hand, it was pleaded in defence by Miss Barstow,

1. That as the property over which the bond extended had been conveyed to the pursuer, subject to the condition of the payment of the debt, he was not entitled to insist in this action.

2. That in the peculiar circumstances in which she stood in relation to Mr. Russell at the date of the transaction, and having placed unlimited confidence in him, and relied entirely upon his constituting a legal and effectual obligation against himself, it would not have been competent for him to have maintained the

illegality of the transaction, or to set it aside on the allegation of its being usurious; and as the pursuer represented Mr. Russell, he was barred from insisting in the conclusions of the action.

3. That the transaction was not of the nature of an ordinary loan of money, but was the sale of a subject which was of a fluctuating nature in point of value, for a price payable only if the stocks reached 88¼ per cent., and for an annuity if they did not reach that price, whereby there were contingencies giving each party their chance of gain or loss; that, accordingly, if stocks had immediately risen to their present selling price, the interest payable would have been greatly less than five per cent., whereas, if they had fallen, it might have been larger; so that it was impossible to say that this was an ordinary loan at more than five per cent.; and,

4. That the statute of Geo. II. had reference to sales where the party had no stock, and was made with a view to prevent gambling on the Stock Exchange, and not to apply to such transactions as the present one.

The Court, on the report of the Lord Ordinary, sustained the pursuer's title, but assoilzied the defender, with expenses.

Lord Balgray.—There are two pleas in defence which appear to me to be quite insuperable. The first is of the nature of a personal objection. This lady was a member of Mr. Russell's family, and she intrusted to him the entire management of her affairs. In carrying this transaction into execution, she placed the utmost confidence in him. He was the framer of the whole plan, and actually wrote and extended the deed with his own hand. I apprehend, therefore, that Mr. Russell was bound to warrant the validity of that deed, and that there was nothing illegal in it. But if Mr. Russell could not challenge it, I apprehend that the pursuer stands in the same situation. In the second place, there is nothing usurious on the face of the bond; and even on going back to the letter of the 16th of March, on which the case is mainly rested, it is plain that the transaction was of a nature to which it is impossible to apply the laws of usury. It was, in truth, the purchase of an estate of a peculiar description, and which fluctuated in value from day to day. Besides, there are some singular obligations in relation to the repayment of the money, which would probably have had the effect to defeat the payment altogether; and, at all events, the payment was not to be made till stocks rose to 88½, which, at the date of this transaction, no human being could have contemplated as possible. It was altogether a transaction sui generis, to which the objection of usury cannot apply.

Lord Gillies.—I concur in every word which has been said by Lord Balgray.

LORD PRESIDENT.—I am also of the same opinion; and I should wish to ask, if as much had been gained as is said to have been lost by this transaction, we could have had any legal grounds for setting it aside at the instance of the defender? I certainly think not.

LORD CRAIGIE concurred.

Pursuer's Authorities.—4. Ersk. 4. 76; Comyn on Usury, 33. 114. 156, and Cases there; Colville, Jan. 26. 1709, (6825.)

Defender's Authorities.—3. Wilson's Reports, 390; Atkinson, 340; Comyn, 22; Cro. Eliz. 1741; Atk. 301; Ambl. 371; 5. Esp. 164; Robertson's Ap. Ca. 471.

T. INNES, W. S.—P. IRVINE, W. S.—Agents.

No. 151.

W. MAULE, Pursuer.—*Forsyth—Robertson.*
Hon. W. MAULE, Defender.—*D. of F. Moncreiff—Keay—Murray—G. Craig.*

Process—Reduction.—In a reduction of a decree in foro relative to the right to an estate, and the titles thereof—Held that the defender may produce the decree, and thereupon found on it as res judicata, and refuse to produce the titles till the decree is set aside.

Jan. 31. 1827.

1ST DIVISION. Lord Newton. D.

IN 1782 Lieutenant Maule, the father of the pursuer, brought an action of reduction of the titles of the estate of Panmure, under which the defender now possesses it, and in which decree of absolvitor was pronounced. Before the interlocutor was final, and with a view to avoid mutual appeals, the parties entered into an agreement in the form of a submission, which was subsequently found by the House of Lords not to be effectual; but at the same time it was declared, that 'this was without prejudice as to any 'question between the parties in any other action touching any 'property comprised in the deeds of tailzie in the pleadings men-'tioned.' The pursuer, as the representative of his father, then brought an action of reduction of the titles, against which the Court sustained a defence of res judicata, founded on the decree of 1782. (See ante, Vol. III. No. 62.) But, on appeal, the House of Lords pronounced this judgment, in so far as regarded the property of the estate: *—'That the interlocutors complained of 'in the said appeal be, and the same are hereby affirmed with 'respect to the estates of Kelly and Ballumbie, and the bond for '£9000 in the said interlocutors mentioned, so far as the said in-'terlocutors find that all right and interest in the said estates and 'bond, which the appellant claimed under the summons of reduc-'tion and declarator in the said interlocutors mentioned, were 'totally excluded, and the subject-matter of the action then be-'fore the Court as to such estates and bond was res judicata by 'the judgment contained in the decreet of the Court of Session

* See Wilson and Shaw's Appeal Cases, May 26. 1826, p. 451.

'of the 5th of March 1782 in the said interlocutors mentioned, 'in as much as it appears to their Lordships that it was not com-'petent to the appellant, by the summons of reduction and de-'clarator in the said interlocutors mentioned, to impeach such 'decreet of the 5th of March 1782, so far as the same respected 'such estates and bond, and such decreet has not been impeached 'by reclaiming petition or appeal, or any other proceeding com-'petent to impeach the same.' After certain other findings in relation to a claim to certain leases, it was further found in explanation of the judgment containing the above reservation, 'the in-'tent and meaning of the whole of such judgment being to leave 'all questions respecting the right to the said leases, as well as to 'the rest of the property comprised in the deeds of tailzie therein 'mentioned, open to be discussed in such manner as the same 'might be properly discussed in any future proceeding properly 'instituted for that purpose.'

The pursuer then brought an action of reduction, in which he called for exhibition and production both of the decree of 1782 and of the title-deeds of the estate, and concluded for reduction of them on various grounds. The defender produced the decree, but declined to satisfy the production by producing the titles of the estate; in support of which he maintained, That so long as the decree was unreduced, he was entitled to found upon it as a *res judicata*, to the effect at least of withholding exhibition of the titles; and therefore that the pursuer must proceed, in the first place, to have the decree set aside.

To this it was answered, That both in terms of the judgment of the House of Lords, finding that the pursuer was entitled to be heard as to the validity of the titles, provided he impeached the decree in due form, and as he had done so; and also in terms of the Judicature Act, by which it was requisite to make up a single record, the defender was bound to satisfy the production, so that the whole cause might be prepared at once.

The Lord Ordinary found, 'That in order to satisfy the pro-'duction, it is not sufficient for the defenders to produce the de-'cree of the Court of Session of 1st March 1782, as excluding, 'while unreduced, the pursuer's title to call for the other writs 'under reduction;' and therefore repelled the preliminary defence to the production of the said writs, and at the same time stated his opinion in the following note:—'The Lord Ordinary 'is quite aware that the pursuer must succeed in reducing the 'decree, before he can be heard to challenge the other deeds called 'for; but the necessity of following this order does not appear 'to justify the defender's refusal to satisfy the production by pro-

'ducing the whole. In actions of this nature, where a series of 'titles are challenged, the validity of the later ones generally de- 'pends upon that of the earlier; but the defender is not on this 'account allowed to content himself at first with producing a part. 'The case of Irvine of Drum against the Earl of Aberdeen, as 'decided in the House of Lords 2d April 1770, founded on by 'the pursuer, seems very much in point. Besides, the form of 'proceeding contended for by the defender seems inconsistent 'with that required by the act 6th Geo. IV. c. 120, as it would 'be necessary to receive peremptory defences, and to make up 'and close the record, in order to dispose of the decree 1782; 'while, in the event of this being reduced, a further set of de- 'fences would need to be given in, and a second record to be 'made up, in reference to the other deeds. Now, although, from 'the peculiar nature of actions of reduction, dilatory defences 'may be lodged and considered separately, there is no reason 'why the whole peremptory defences should not be stated at 'once, in terms of the 2d section of the act.'

The defender then reclaimed, and prayed to have it found that he was not bound 'to produce any of the titles called for in the 'summons until the decree of 1st March 1782 is actually reduced, 'and to remit to the Lord Ordinary to proceed in that branch of 'the summons, by ordaining the pursuer to lodge a condescend- 'ence of his reasons of reduction.'

The Court (without hearing the defender in reply) altered, and remitted to the Lord Ordinary 'to hear parties upon the reasons 'of reduction, and the defences arising out of the production of 'the decree of the 5th of March 1782, and to proceed farther as 'to his Lordship shall seem proper; but sist process in the mean 'time, relative to the production of the writings called for, other 'than the said decree already produced, and until the reduction 'of the same.'

LORD PRESIDENT.—It is perfectly plain that if the pursuer cannot succeed in reducing the decree, it will have the effect of res judicata; and therefore the process ought to be sisted quoad ultra, and the validity of the decree first be discussed. In the case of Irvine of Drum, the decree founded on was a decree of sale, which was itself one of the titles, so that that case has no application to the present one.

LORD CRAIGIE.—The decree is not properly a title to exclude. It affords a plea of res judicata, and as such is sufficient to exclude the necessity of producing the titles to the estate until it be reduced.

LORDS BALGRAY and GILLIES concurred.

D. FISHER,—FOTHERINGHAM and LINDSAY, W. S.—Agents.

J. Crawford, Pursuer.—*Cuninghame.*
J. Walker, Defender.—*Greenshields.*
J. Russell, Defender.—*Wilson.*

No. 152.

Sale—Acquiescence.—Heritable subjects burdened with debt, having been exposed to sale under articles of roup, on the narrative that they were consented to by the creditor, and on the condition that, before payment of the price, an assignation to the debt was to be granted; but not being signed by him, and the purchaser having paid the price to the exposer without obtaining an assignation—Held, that although the creditor attended and offered at the sale, the debt still remained a burden on the property.

Jan. 31. 1827.
1st Division.
Lord Eldin.

The late David Black, as trustee on the sequestrated estates of Auld and Meiklejohn, exposed to public sale in lots certain heritable subjects belonging to the bankrupts. Over these the defender James Walker held two heritable bonds, the one for £150 and the other for £50, and Black himself held another bond in his private capacity for £400. In the articles of roup it was stated that the sale was made with the consent of James Walker, and it was provided that the price should be payable to Black, and that 'upon the purchaser making payment of the price, or 'granting security as aforesaid, the said David Black, as trustee 'foresaid, shall be bound and obliged, as he hereby binds and 'obliges himself, to purge the said subjects of all encumbrances 'affecting the same, excepting the heritable debts before specified, 'which are to be assigned to and in favour of the purchaser, as 'before mentioned, and to deliver a formal and valid disposition 'of the shares of the aforesaid subjects which belonged to the 'said Jabez Auld and Andrew Meiklejohn, to the purchaser and 'his heirs and assignees, containing procuratory of resignation, 'assignation to the writs and evidents, and to the rents, mails, 'and duties, and all other usual and necessary clauses; and farther, 'to deliver to the said purchaser or purchasers valid dispositions 'and assignations by himself and the said James Walker of the 'debts before specified, in so far as the same affect the subjects 'respectively, and proportionally to the several prices aforesaid; 'together with the said heritable bonds themselves, and infeftments following thereon.'

The articles of roup, however, were not signed by Walker; but they were read in his presence at the sale, where he attended to bid for a friend, which he did, and was preferred to one lot 'upon 'the conditions mentioned in the articles;' and he signed a minute to that effect. Another lot having been purchased by the pursuer Crawford at £490, he paid to Black £450, but did not obtain from him any disposition of the property, or any assigna-

tion from Walker of his heritable debts. Thereafter Black died bankrupt; and Crawford brought an action of adjudication in implement against Russell, (who had been appointed trustee in place of Black,) and also against Walker, for the purpose of having the property and debts conveyed to him.

In support of this action he contended, That although the articles of sale had not been subscribed by Walker, yet they had been read in his presence; and as he had offered for and been preferred to one of the lots, and as he had signed a minute in relation to them, he was bound by them; and therefore, as it was a condition of them that the debts should be assigned to the purchaser, and as the pursuer, on that faith, had paid the price to Black, he was entitled to have the debts conveyed to him.

In defence Walker stated, That he had not given any consent to the statement contained in the articles of roup, and that as he was merely bidding for a friend, he did not pay particular attention to them; but at all events, as it was a condition of them, that before payment of the price, the purchaser was to receive an assignation to the debts, he was not entitled to pay the price until that assignation was granted, and therefore the debts must remain effectual against the property.

By Russell it was stated, That he was willing to convey the property so far as the bankrupts were concerned, but that he had no power to assign or discharge the heritable debts. The Lord Ordinary repelled the defences for both parties, but the Court unanimously altered, and assoilzied both defenders.

Lord President.—There is an express stipulation that the purchaser was to receive an assignation to the debts before paying the price; and therefore, if the pursuer chose to pay the amount to Black without receiving an assignation from Walker, he has himself alone to blame.

Lord Gillies.—Even if Walker had read and signed the articles of roup, he was entitled to consider himself safe, because it was expressly stipulated that, before doing so, Black was 'to deliver to the 'said purchaser or purchasers valid dispositions and assignations by 'himself and the said James Walker of the debts before specified.'

The other Judges concurred.

J. Malcolm,—D. Wilson, W. S.—J. Johnston Jun.—Agents.

P. HODGE, Suspender.—*A. M'Neill.*
W. WEDDERSPOON, Charger.—*Jameson.*

No. 153.

Bill of Exchange.—THIS was a question between the trustee of the drawer and the acceptor of a bill, which, it was alleged, formed one of a series of transactions, and which had been extinguished to a large extent. The Lord Ordinary having repelled the reasons of suspension, the Court recalled the interlocutor, and remitted to him to send the case to an accountant.

Jan. 31. 1827.
1st DIVISION.
Lord Eldin.
S.

W. GLOVER, W. S.—W. MURRAY, W. S.—Agents.

J. ROBERTSON and Others, Pursuers.—*Fullerton—Cuninghame.*
BELL'S TRUSTEES, Defenders.—*Skene—Brown.*

No. 154.

THIS was an action for implement of certain obligations under a feu-contract, as having been entered into jointly by the late John Bell and one Boyd, through the intervention of M'Kerlie. The defence was, that the parties were not joint feuars, but that each was feuar of the one half. The Lord Ordinary found, 'that 'there is sufficient evidence that the contract of feu by Alexander 'M'Kerlie was made by the said Alexander M'Kerlie, acting 'for behoof of John Bell and Robert Boyd, and therefore that 'the said John Bell and Robert Boyd were bound, conjunctly and 'severally, to implement that contract;' and the Court adhered.

Jan. 31. 1827.
2D DIVISION.
Lord Mackenzie.
F.

T. M'KENZIE, W. S.—W. BALLANTYNE, W. S.—Agents.

R. ALLAN, Pursuer.—*D. of F. Moncreiff—More.*
H. SWAN and Others, Defenders.—*Cockburn—R. Bell.*

No. 155.

Burgh—Acquiescence.—A singular successor to a property in a town is not entitled to insist on the removal of a well erected in front of it by the Magistrates for the public convenience, except in so far as it encroaches on his private property, it having stood without objection for 35 years.

IN 1788, the Stentmasters or Magistrates of Kelso, (which is a Burgh of Barony,) with the view of dividing more conveniently the distance between the public wells, removed one from its former situation, and, with the concurrence of the Duke of Roxburghe, the proprietor of the butcher market, they fixed it in the wall of the market fronting Roxburghe street, one of the principal streets of the burgh. This well consisted merely of a pipe taken up through the wall, and projecting from it with a stop-cock. In this situation it remained unchallenged for 35 years; but Allan, the

Jan. 31. 1827.
2D DIVISION.
Lord Mackenzie.
M'K.

pursuer, having purchased the market-place, raised an action against the Stentmasters, concluding to have it found that they had no right to keep this well in his private wall; and he obtained a judgment, whereby the Court, 'in respect it is not alleged the 'defenders have any title to the wall in question, or have acquired 'any servitude over the pursuer's property, and that the liberty 'which, according to their own statement, they got by verbal 'tolerance from the pursuer's author, was of such a description 'that the proprietor was not barred from insisting on the well 'being removed when he thought proper to do so,' ordained the Stentmasters to remove the well from the property of the pursuer. In obedience to this judgment the Stentmasters removed the well from the wall, but merely to the edge of the foot-pavement, where it was erected in the form of a cast-iron tube or pillar. Allan then brought a second action to have Swan and the Stentmasters ordained to remove the well 'from the situation in which they 'have erected the same in Roxburghe street, immediately adjoin-'ing the front of the foresaid property of the pursuer;' and he contended,

1. That the Stentmasters, without the authority of the Legislature, had no power to make any erections in the public streets.

2. That the erection here in question was in opposition to the former judgment of the Court.

3. That a well immediately in front of his property was a nuisance, to which he, as an individual, was not bound to submit; and,

4. That the water was allowed so to run against his wall, as to undermine and otherwise injure it.

To this it was answered,

1. That Magistrates of burghs were entitled to make such erections as wells, lamp-posts, &c. on the public streets, for the benefit and convenience of the inhabitants at large; and that the well in question could not be removed without considerable inconvenience to the inhabitants, whose only means of being supplied with water was from these public wells.

2. That the previous judgment had reference only to the encroachment on the pursuer's private property.

3. That the well having remained in this situation unchallenged for so long a period, no one was now entitled to object to it; and,

4. That in point of fact no injury was done, but that the Stentmasters were willing to take measures to guard against any damage occurring.

The Lord Ordinary assoilzied the Stentmasters, with expenses; and the Court unanimously adhered, with this qualification, that

the Stentmasters should be bound to prevent any actual injury to the wall.

The Lord Ordinary observed in a note:—

The only question raised either by the declarator or suspension is, Whether a well can be placed on the street, opposite the pursuer's premises? It appears to the Lord Ordinary, that in the circumstances in which Kelso is admitted to stand, the making of public wells or fountains in proper places of the streets is not an encroachment, but a legitimate use of the streets of this burgh of barony. This use is quite different from erecting buildings on the streets, which are, of course, of no use to the public at large, but a species of appropriation, which, in a royal burgh at least, has been said to be purpresture. Wells such as that in question are for the use of the public, just as much as the pavement, kennel, lamp-posts, or railings on the streets are. The only question, therefore, seems to be, Is there sufficient reason for holding, that this well, being opposite to the pursuer's premises, is thereby placed in a part of the street so improper, that it ought to be removed or suppressed? And in the circumstances, as appearing from the condescendence and answers, the Lord Ordinary thinks that there is no such reason, but the reverse. The circumstances, in particular, that this well was placed in this part of the street so many years ago, and continued there so long without objection in any quarter, seems of very great weight. It is true that an error was committed in placing a part of the well (or cistern of it) a few feet within the private property, then of the Duke of Roxburghe, (the rest being placed on or over the street,) without obtaining from his Grace a probative instrument of right to do so, though it is plain the Duke, or those taking charge of his affairs, must have acquiesced at least in this erection, which stood openly on the street, forming the chief access to his place from Kelso. And, accordingly, the pursuer coming as a singular successor in the place of the Duke, and taking advantage of this error, has obtained a decree in favour of himself as a private proprietor, removing the well as far as it is situated on his private property, but this solely on the ground of the want of title of servitude in the defenders, (vide the decree.) This, however, cannot do away the effect of the original and long-continued acquiescence, fixing that, as far as the public is concerned, the well ought to stand in this part of the street, or authorize either suppressing it, or placing it in a different part of the street, without far stronger reasons than any that are stated. As far as the public is concerned, there is manifestly no substantial difference between what exists now, and what existed before the interference of the pursuer as a private proprietor. But it is only as one of the public having right to the street, that the pursuer now sues;—he does not here sue as a private proprietor encroached on. The fact that it was the pursuer, as a

private proprietor, who, insisting on his private right, thrust forward this well somewhat further into the street, can surely not give him a better right to complain of it than his opposite neighbour has, who does not appear to have attempted any such complaint, and does not seem to the Lord Ordinary to have any grounds on which he could have supported it, if inclined; nor does the Lord Ordinary think that the pursuer has any.

In this opinion their Lordships entirely concurred.

J. TAIT, W. S.—A. DOUGLAS, W. S.—Agents.

No. 156. W. AULD, Suspender.—*D. of F. Moncreiff—Cuninghame.*
T. BAIRD, Charger.—*Jeffrey—Whigham.*

Mutual Contract.—A party who had entered into a contract with the proprietor of a steam-engine for a supply of power, but had fallen into arrear of the stipulated remuneration, and become insolvent, having given a charge to compel a continuance of the supply of power which had been withheld by the proprietor of the engine; the Court, after allowing him time to find caution, which he failed to do, passed a bill of suspension by the proprietor simpliciter.

Jan. 31. 1827.
2D DIVISION.
Bill-Chamber.
Lord Alloway.
F.

AULD was proprietor of a snuff-manufactory, in which he had erected a steam-engine of considerable power. Contiguous to this, Baird, the charger, built a power-loom factory on a piece of ground feued by him for that purpose, and entered into a contract with Auld for obtaining from him the use of the surplus power of his engine. By this contract, dated in 1823, and which was to last for ten years, with a mutual break at the end of five years, it was stipulated that Auld should furnish Baird with a certain extent of steam power, not exceeding eight horses power, at the rate of £30 per annum for each horse power; and a provision was made for determining the quantity of power used, and settling all disputes between the parties by reference to arbiters.

Baird began to get the use of the power at Whitsunday 1823, and continued to possess it till Whitsunday 1826. At this period he had paid no rent whatever for the year ending at that term, and Auld alleged that for the preceding year he owed a large sum, having used a greater extent of power than he had paid for in that year. He had also fallen into insolvent circumstances, and called a meeting of his creditors; and the building in which his manufactory was carried on was covered by heritable securities, and the title-deeds were subject to a right of hypothec on the part of his law-agent. In these circumstances, Auld, not being able to give a charge for the rent in consequence of the contract being in Baird's hands, and not recorded, raised an ordinary action before the Magistrates of Glasgow, in which he con-

cluded only for £200, being the rent of that extent of power which Baird himself admitted he had enjoyed. He also took certain steps in order to ascertain by arbiters, in terms of the contract, the quantity of power supplied to Baird; but the latter having thrown various obstacles in the way of doing this, and another half year being nearly expired without any payment of rent, Auld determined to discontinue the supply of power. Baird thereupon recorded the contract, and gave Auld a charge to compel him to furnish the power in terms of the contract. Of this charge Auld presented a bill of suspension, on the ground that he was not obliged to continue the supply of power, which required a constant outlay, while Baird did not perform his part of the contract by payment of the stipulated rent; and he contended that this agreement was not at all of the nature of a lease of lands, but of a contract of hiring; as, for instance, of the use of so many horses daily, which one party was entitled to give up as soon as the other failed in the performance of his part of the agreement. He offered, however, to continue to supply the power, on caution being found for the rent.

On the other hand, Baird maintained that this was like an ordinary contract of lease, and that he could not be deprived of the possession of the subject let, whereby a great number of individuals would be thrown at once out of employment, merely by falling a year's rent into arrear; and as to caution being required, that Auld, by raising an ordinary action for the rent, instead of charging on the bond, which would have obliged Baird in a suspension to find caution, had barred himself, by the form of action which he had chosen, from now insisting in it, and had also barred himself from this brevi manu suspension of the contract while the matter was sub judice.

The Lord Ordinary having reported the bill on Cases, the Court, after allowing Baird a few days to find caution, on his failure to do so, unanimously remitted to pass the bill.

Lord Justice-Clerk.—This case is not attended with much difficulty. Although the contract is somewhat of a novel description, yet it has not the least resemblance to the contract of lease, but is merely an agreement for the supply of power. We cannot here go into the disputed fact as to how much power is to be paid for; it is enough that an admitted rent of £200 is unpaid for nearly three half years; and the charger being in such circumstances as to call a meeting of his creditors, and having granted heritable securities over his property, the title-deeds of which are in the hands of his man of business, it is impossible to compel this man, who has no security for his rent in the way of hypothec, as an ordinary landlord

has, to continue to give a supply of steam power, when the other party is in arrear, and will not find caution. It may no doubt be attended with unfortunate circumstances to the workers in this factory; but we must look to the other side also, and we see that the suspender would be put to a great expense, without even a chance of getting any remuneration. If the charger pay the arrears, or find caution for them and the current rent, he may be entitled to get the power supplied, but not otherwise.

LORD PITMILLY was of the same opinion.

LORD ALLOWAY.—I also entirely concur. I reported the case with a view to give the charger time to find security; but, as he has not done so, we must pass the bill.

W. WADDEL, W. S.—J. FORRESTER, W. S.—Agents.

No. 157. Mrs. DICKSON or ROUGHEAD, Pursuer.—*D. of F. Moncreiff—Skene.*

J. HUNTER and Others, Defenders.—*Jameson.*

Husband and Wife—Discharge of Legal Provisions.—Held that a contract of separation and provision, whereby a husband bound himself to pay to his wife, during her life and separation, an annuity of £30, in consideration of which she renounced all legal claims against him, was not effectual to bar her from claiming her legal provisions on his death,—the amount not being fair, onerous, and adequate in the circumstances of the husband.

Feb. 1. 1827.

1ST DIVISION. Lord Meadowbank. H.

THE pursuer Isobel Dickson was married in 1814 to James Roughead, tenant in Jerdanfield, and resided with him till April 1815, when a deed of separation and bond of aliment was executed between them. By this deed Roughead bound himself 'to make payment to the said Isobel Dickson of the sum of £30 'sterling during the said Isobel Dickson's life, and the continu-'ance of the present separation;' but declaring 'that the said 'annual payment shall be in full of all claim which she, the said 'Isobel Dickson, has or might have had right to from or against 'the said James Roughead, or his means and estate, either in 'virtue of her jus relictæ, or any other right or privilege, though 'not here enumerated, to which a lawful wife is entitled by law 'or otherwise.' On the other hand, she bound herself to live separate from him during her life, and accept 'of the said sum 'of £30 sterling, settled on her in manner foresaid, in full of all 'claim for separate aliment, board, clothes, or other necessaries 'and expenses of all kinds, which she can or might demand by 'law from the said James Roughead as his wife, or from his fore-'saids, and in full of all right which she can, could, or might 'have claimed from the said James Roughead, or his means and

'effects, or can or might claim from his heirs &c., either in vir-
'tue of her jus relictæ, or in virtue of any other right or privi-
'lege to which a lawful wife is entitled by law or otherwise: All
'which rights and privileges she, the said Isobel Dickson, hereby
'renounces for ever.'

At the time of the execution of this deed, no state of funds was exhibited; but it was admitted that Roughead was then possessed of free funds to the amount of upwards of £2700, although it was alleged that his farm was at that time a losing concern. No security, other than his own personal obligation, was granted for payment of the annuity; and on his death it was found that he had acquired funds, by succession and otherwise, to the extent of upwards of £5000, so that he died possessed of about £8700. He left no lawful children, and he had conveyed, by a deed of settlement, his whole effects to Hunter and others, as trustees, for the purpose of dividing his free residue among his grandchildren by a natural daughter.

Thereafter the pursuer brought an action against them, concluding for payment of one half of the moveable funds, as the share or proportion of the goods in communion belonging to her as relict.

In defence it was maintained, That as she had expressly renounced her legal provisions by the above contract, in consideration of the payment of the annuity, and as it had been regularly paid, both prior and posterior to the death of Roughead, it was not competent for her to revoke that deed.

To this it was answered, That the deed could not regulate the rights of parties, except during the separation, and was revocable, quoad ultra, as a donation inter virum et uxorem; and that at all events the annuity of £30 was not a fair and reasonable provision for the widow of a person who had died possessed of funds to the amount of nearly £9000.

The Court, on the report of the Lord Ordinary, found 'that
'the pursuer is not bound by the contract of separation, and re-
'pelled the defences founded thereon, and found that she is en-
'titled to her legal provisions as the widow of James Roughead
'deceased;' and remitted to proceed accordingly.

The Judges were of opinion, that as no statement of Roughead's funds had been exhibited at the date of the contract, — as the annuity was not a fair and adequate provision, and as no security had been granted even for that small provision, it could not be considered as truly onerous, and therefore it was not binding on the pursuer to the effect of preventing her from revoking it, and claiming her legal provisions.

Pursuer's Authorities.—1. Ersk. 6. 29; M'Lellan, Dec. 22. 1758, (6098); Watson, June 17. 1774, (6103); Scott, Aug. 10. 1776, (No. I. App. Husband and Wife); Cramond, Jan. 4. 1757, (6103); Palmer, Jan. 25. 1810, (F. C.); M'Diarmid, May 17. 1826, (ante, Vol. IV. No. 581.)

Defenders' Authorities.—Gibb, March 14. 1634, (6116); Chalmers, July 25. 1710, (6056); M'Pherson, Jan. 30. 1750, (6113); Stewart, Nov. 22. 1769, (6100); Palmer, Jan. 25. 1810, (F. C.)

R. MATTHEW,—J. H. LOTHIAN,—Agents.

No. 158.

J. BLAIKIE, Petitioner.—*Skene.*

Curator Bonis.—Authority granted to a curator bonis to complete his ward's titles.

Feb. 1. 1827.

2D DIVISION. M'K.

THE Court, on the application of Blaikie, curator bonis to Skene of Carraldstone, a person deaf and dumb from his birth, granted authority to complete Skene's titles as heir of entail in the lands of Carraldstone and others.

Authorities.—Lord Bargeny, 1711; A. v. B. July 30. 1736, (6. Elchies, voce Tutor and Pupil); Baird &c. Jan. 20. 1741, (Kilk. p. 585); Riddell, Nov. 11. 1746, (Kilk. p. 586); Sir J. C. Anstruther, March 3. 1818, (F. C. note.)

INGLIS and WEIR, W. S. Agents.

No. 159.

J. DICK, Suspender.—*Fullerton—Sandford.*
FLESHERS of STIRLING, Chargers.—*D. of F. Moncreiff—Sol.-Gen. Hope—Forsyth.*

Exclusive Privilege—Stat. 1703, *c.* 9.—The Fleshers' Incorporation of a Burgh cannot acquire, in opposition to the statute 1703, *c.* 9, (which held as to this not to be in desuetude,) the privilege of restricting the sale of butcher meat by unfreemen to the public market and market-days.

Feb. 1. 1827.

2D DIVISION. Lord Mackenzie. B.

THE Incorporation of Fleshers of Stirling, (which consists at present of two members,) alleging that they possessed an exclusive privilege of selling butcher meat within burgh, (except on market-days, when unfreemen might sell, but only in the regular market-place, and on payment of certain dues,) presented an application to the Magistrates, setting forth that Dick, an unfreeman flesher, was in use to slaughter cattle within the burgh, and to sell the flesh every day of the week, and that not within the market-place, but in a private shop in the burgh, and praying the Magistrates 'to prohibit and discharge the said John Dick from 'exposing and sending fleshes or butcher meat within the burgh 'in all time coming, excepting within the fleshmarket, and upon 'the ordinary market-days, upon his paying the dues and customs upliftable there from unfreemen and country dealers, according to use and wont; and to prohibit and discharge him

'also from slaughtering within the slaughter-house of the incor-
'poration, or elsewhere within the burgh.'

In support of their right to make this application, they founded on alleged usage, and also on an old proclamation, annually repeated within the burgh, ordering, inter alia, 'that no meat 'shall be kept and sold in houses or cellars, under the penalty of '£3 Scots for each beast concealed after the hours for opening 'the market.'

It appeared from Dick's deposition, emitted on a reference by the incorporation, that he had not slaughtered cattle within the burgh since 1817, and that prior to that period he had the permission of the incorporation, for which he had paid a certain sum annually; and in regard to his selling flesh within the burgh in a private shop, and on other days than the market-days, he contended that unfreemen fleshers were entitled to sell butcher meat within burgh, without restriction either as to place or time, in virtue of the statute 1703, c. 9, which was in full observance as to this matter, whereby it is declared, that 'it shall be leisome to all persons 'whatsoever to sell and break all sorts of fleshes on every lawful 'day of the week, and that in all the burghs and towns of this 'kingdom, free of any imposition whatsomever, the petty customs 'of burgh excepted.' He further pleaded, in reference to the annual proclamation of the Magistrates, founded on by the incorporation, that it was entirely a matter of police, intended chiefly to prevent forestalling, which the incorporation were not entitled to insist on, having no exclusive privileges to be affected by the breach of it.

In answer to this the incorporation pleaded, That the act 1703 was in desuetude, or at least that it had never been observed in the burgh of Stirling, so that they had, notwithstanding, acquired the exclusive privilege claimed by them, and were entitled accordingly to complain of the breach of any regulation whereby the beneficial exercise of their rights was injured.

The Magistrates, on considering a proof of the alleged usage, found 'it proved that the fleshers of Stirling have, for more 'than forty years past, enjoyed the privilege of an incorpora-'tion, and have in particular possessed the privilege of slaugh-'tering within burgh, to the exclusion of all others, without 'their consent or agreement; also that they have, during the 'same period, prevented all unfreemen from selling fleshes or 'butcher meat, except within the market-place, without their per-'mission;' and they therefore found 'that no unfreemen can 'slaughter within this burgh without leave of the incorporation, 'or sell fleshes or butcher meat but in the market-place, and that

'on market-days only, without their leave;' and interdicted 'the 'defender John Dick to that effect accordingly.'

Dick having continued, notwithstanding this interdict, to sell butcher meat in his shop as formerly, the incorporation presented a petition to the Magistrates, complaining of this breach of interdict, and praying to have him imprisoned till he should find caution to obey the interdict in all time coming. On this petition Dick underwent an examination by the Magistrates, in which he admitted selling flesh in his shop, and stated that 'his reason for 'continuing the sale is, that he intends to take the cause to an-'other Court.' The Magistrates thereupon granted warrant for his incarceration until he should find caution in terms of the prayer of the petition, and he was incarcerated accordingly. He, however, immediately presented a bill of suspension and liberation, which was passed; and the expede letters having come to be discussed before Lord Mackenzie, his Lordship suspended the letters simpliciter, and found Dick entitled to expenses, 'under 'deduction of the expenses arising from the breach of interdict 'committed by the complainer,' to which he found the respondents entitled. To this interlocutor the Court unanimously adhered.

The Lord Ordinary observed in a note:—

The LORD ORDINARY thinks, that, in respect to slaughtering, there was no occasion for any procedure against the complainer, who appears not to have done anything in violation of the rights of the respondents, and who claimed nothing contrary to their rights. In respect to the selling of flesh by the complainer, not being entered in the corporation of fleshers, and on days not market-days, the Lord Ordinary thinks that the statute 1703 has not been shown to be in desuetude generally, but the contrary; and he does not think it could go into desuetude in Stirling, while it was observed in other places. In respect to selling in a shop not being in the market, the Lord Ordinary thinks that a restriction in any town in Scotland of all sale of flesh to the market, and consequently to the market hours, is not compatible with the spirit and intention of the statute, and at any rate he sees no good authority for such a restriction in Stirling. The proclamation of the Magistrates seems to be an antiquated one against forestalling or keeping up meat from public sale, not now of much authority; nor does the Lord Ordinary see what title the fleshers could have to enforce it, if it were an act of Parliament. A statute prohibiting the sale of flesh, except in the public market, would, it is conceived, be enforced, by complaint against transgressors, at the instance of the public prosecutor, not of any individual flesher, unless specially authorized to prosecute, any more than of

any individual buyer of flesh, or any number of such buyers. In regard to the breach of interdict, the complainer was quite wrong in violating the interdict while it stood against him. His intention to suspend was no sufficient excuse, and the proceedings against him there seem far from severe; but there seems nothing which can be left to operate against him under that proceeding, except the finding for expenses.

Lord Justice-Clerk.—Even assuming the statements of the incorporation to be correct, Dick has been a great deal too hardly treated. It was not justifiable at common law to grant summary warrant for imprisonment, as was here done, without his being ordered first to find caution; and therefore, as to the liberation, I could not have hesitated one moment; at the same time, we can never countenance any breach of interdict, and the Lord Ordinary has followed a proper course in finding him liable in expenses as to that matter. In regard to the slaughtering of cattle within the burgh, it appears that for some time past Dick has slaughtered within the county of Clackmannan, and his admission of having at one time slaughtered within the burgh is qualified with this, that he then paid his dues; there is no sufficient evidence, therefore, that he has slaughtered without permission. The next point of the case is the alleged violation of the incorporation's privilege by the sale of meat in the burgh on days not market-days; and this raises the question, whether the act 1703 be in desuetude? No doubt, the first part of it is so, and indeed it never appears to have been enforced for a single day. But then there is the other important provision, extremely beneficial for the community, allowing out-town butchers to break and sell flesh within burgh. Now, it is in no way inconsistent with our law, that one part of a statute should go into desuetude, while another part remains in force; and it is notorious that the latter part of this statute is in observance all over the country. But it is said to be in desuetude in Stirling, and that the corporation have acquired a right contrary to the public law of the land. We can give no countenance to such a doctrine as that a statute should be in observance all over the country but in one place; and I therefore agree with the Lord Ordinary that the statute must receive full effect there as elsewhere. We then come to the third point, whether the c untry fleshers are obliged to sell in the market under authority of the proclamation founded on? But supposing that proclamation to be less ambiguous than it is, I entertain the greatest doubts of the legality of the Magistrates of a burgh pretending to declare law contrary to the enactments of the Legislature. A police act might give some such authority, but a proclamation by the Magistrates cannot take away privileges bestowed by an act of Parliament which imposes no such restrictions. I therefore agree entirely with the Lord Ordinary.

Lords Pitmilly and Alloway concurred.

'proceed on induciæ of forty days against the defender resident 'in Orkney, and of six days against the other defender.'

J. S. DARLING,—Agent.

No. 163.

M. PERSTON, Pursuer.—*D. of F. Moncreiff—Ivory.*
J. M'ALISTER, Defender.—*Thomson—A. M'Neill.*

Repetition—Superior and Vassal—Clause of Pre-emption.—Circumstances under which it was held that a person who had purchased lands, in the titles of which there was a clause intended to give a right of pre-emption to the superior, and who, in order to get an entry, paid the superior a sum of money to pass from that right, was not entitled to repetition from the seller.

Feb. 2. 1827.
1ST DIVISION.
Lord Eldin.

THE late John Perston (of whom the pursuer was the heir and representative) purchased certain lands held of Sir Archibald Campbell of Succoth and his eldest son from the defender, who granted the usual obligation to infeft by two several manners of holding, the one thereof to be holden of himself in free blench, and the other under his immediate lawful superiors for payment of the feu-duties specified in the titles; and for these purposes he granted procuratory of resignation and precept of sasine, and bound himself to warrant the right to be free and safe. On this disposition sasine was taken in virtue of the precept.

By the original feu-charter it was stipulated by the superior, that if it should happen that the vassal should 'sell, dispone, or 'alienate the said lands and pertinents to any person or persons 'without redemption, then and in that case they shall be bound 'and obliged to make the first offer to us and our foresaids, &c. 'for the just price of the same, and no more, for which they would 'sell the said lands to any other, and that by the oath of the 'buyer and seller;' and failing the superior accepting that offer, then he was to receive the purchaser on payment of a taxed sum.

On the death of his brother, the pursuer being desirous to enter with the superiors, applied to them accordingly; but they, founding on the above clause, and insisting that they had a right of pre-emption, refused to enter him, except on payment of a full year's rent, which he accordingly paid. He then brought an action of relief against the defender, alleging that, prior to selling the property, he ought to have made the first offer to the superiors, so as to have enabled the late Mr. Perston, or the pursuer his representative, to have got an entry without obstruction; and as he had become bound to infeft them by a double manner of holding, and had granted a clause of absolute warrandice, he ought to be

ordained to repay the sum which the pursuer had been compelled to advance, in order to obtain a public infeftment.

To this it was answered, that the late Mr. Perston must have been aware of the clause which appeared in the titles, and have taken it into consideration in purchasing the lands; and at all events, as it was one of the casualties stipulated for by the superior, it fell upon the singular successor, and not upon the seller. The Lord Ordinary assoilzied the defender, and the Court adhered.

The Court seemed to be of opinion that the clause of pre-emption was unintelligible, and not effectual, seeing that it provided that after the lands were effectually sold, they were to be offered to the superior; but that at all events the pursuer had acted rashly in paying anything to the superior before the validity of it had been ascertained.

GIBSON-CRAIGS and WARDLAW, W. S.—A. SWINTON,—W. S.—Agents.

T. MEGGET, W. S. Pursuer.—*Murray.*
W. THOMSON, Defender.—*R. Bell—J. W. Dickson.*

No. 164.

Agent and Client.—Circumstances under which an agent who had been advised by counsel to prepare a summons in a particular form, and which was found erroneous, was entitled to payment of his account, although instructions to a different effect had been given.

Feb. 2. 1827.

1ST DIVISION. Lord Eldin. D.

IN February 1821, the defender Thomson, through his agent in the country, transmitted a memorial with queries relative to the institution of an action at his instance against a corporation in Dundee, of which he was a member, for the alleged misapplication of part of their funds. The memorial concluded by stating, that 'these are the general outlines of the case; and if Mr. Megget or counsel shall be of opinion (and it is particularly requested 'that due consideration be given to the case) that a conclusion 'regarding the expenses,' &c. In a letter accompanying this memorial it was stated, that 'we would wish all those members 'who attended the meetings to be included in the action, to save 'any risk of taking the wrong persons.' Megget in consequence laid the cause before counsel, who gave an opinion that Thomson was entitled to insist that the funds should be restored; and this having been comunicated to his agent in the country, that person immediately wrote to Megget, that 'I am directed to request 'you forthwith to follow up the second and third branch of the 'memorial and opinion by an action of declarator, and for repeti-

'tion of the monies illegally paid away,' &c.; and he concluded by requesting him to give 'me a draft of the proposed action, in 'whatever shape it may be recommended.' On receiving this letter, Megget again consulted counsel, who (it was stated) advised a summons to be raised against the office-bearers of the corporation, instead of the members. A summons in these terms was accordingly prepared and revised by counsel, and it was then transmitted to Thomson, who received it in the absence of his country agent, and caused it to be executed against the office-bearers.

The action was afterwards dismissed by the Court, on the ground that it had not been directed against the proper parties, (see ante, Vol. IV. No. 192.) Megget then brought an action for payment of his account of expenses against Thomson; in defence against which he pleaded, that he had directed the action to be instituted against the members of the corporation, whereas Megget had raised it against a different and a wrong party; and as he had not been instructed to take the opinion of counsel as to the manner of bringing the case into Court, and was not entitled to do so unless specially authorized, he had no claim against the defender.

To this it was answered,

1. That it was plainly implied in the communications made by the defender that Megget was to consult counsel, and at all events it was his duty to do so in a case which was of importance and difficulty, and to be guided by their advice; and,

2. That as the summons had been transmitted to the defender, and had been executed under his orders against the office-bearers, and as he had never objected to the terms in which it was drawn, he was not entitled to resist payment.

The Lord Ordinary decerned in terms of the libel, and the Court adhered.

LORD BALGRAY.—The general rule certainly is, that an agent is bound to attend to the instructions which are given to him; but in this case it is impossible to find fault with the pursuer for allowing himself to be guided by the advice of counsel. Besides, the defender acquiesced in this, and did not object to the form in which the summons was framed.

LORD PRESIDENT.—The instructions as to calling all the members of the incorporation were not positive. It was merely said that 'we 'would wish' them to be called; but the summons was to be drawn in such way as should be recommended. If, therefore, counsel gave it as their opinion that the office-bearers should be called, which they certainly did, it was the duty of the pursuer to follow their advice.

LORD GILLIES.—If the pursuer consulted counsel on this point, and

acted by their advice, I think he is exonered; and I also think that in a matter of this nature he was bound to follow the advice of counsel, if he was told that it was the only safe course. But my doubt is, whether there is sufficient evidence before us that he did act by the advice of counsel. Perhaps, however, the defender may be barred by acquiescence.

LORD CRAIGIE.—I also think that the fact should be investigated; but I am quite clear that where instructions are given to an agent to prepare a summons in a particular form, and if he deviate from them, he must, in order to justify himself, show that he was desired by counsel to do it in a different manner. But I do not see from any evidence before us, that counsel directed the pursuer to raise the action against the office-bearers.

T. MEGGET, W. S.—M. PATISON,—Agents.

J. B. TATNALL, Suspender.—*Fullerton—Hopkirk.*
A. REID and Agents, Respondents.—*D. of F. Moncreiff—Currie.*

No. 165.

Interdict—Jurisdiction.—Interdict granted to prevent the trustee on a sequestrated estate using a procuratory of resignation vested in the bankrupt, who had previously granted to a creditor an heritable bond containing the usual assignation to the writs and titles, and in virtue of which procuratory the trustee was attempting to pass a signature and charter in Exchequer to cut out the heritable creditor.

Feb. 2. 1827.

2D DIVISION. Bill-Chamber. Lord Newton. F.

THIS was an application by bill to have Reid, trustee on James Gibson's sequestrated estate, and his law-agents, interdicted from using certain title-deeds belonging to the bankrupt for the purpose of obtaining a Crown charter, which was in cursu in Exchequer, under the following circumstances:—

In 1702 Andrew Gibson (primus) purchased the lands of Hillhead from one Haliburton, who granted him a disposition with procuratory and precept. Andrew did not execute the procuratory, but was base infeft on the precept. In 1734 he died, and was succeeded by his son John Gibson, who made up an erroneous title by expeding a special service, on which he obtained a Crown charter, and was infeft, as if his father's title had been a public holding. On John's death, Andrew (secundus) succeeded, who discovered the blunder, and, by way of remedying it, he served heir in general to Andrew (primus,) his grandfather, passing over his father John, but overlooking the circumstance, that John's special service necessarily included a general service to Andrew (primus.) Conceiving that he had thus taken up the unexecuted procuratory in Haliburton's original disposition to his

grandfather, he resigned thereon, and obtained a Crown charter, on which he was infeft. He then, as superior, granted a precept of clare constat in favour of himself as heir to his grandfather in the dominium utile, which he thereafter resigned in his own hands ad remanentiam, in order to consolidate the base right feudalized in his grandfather's person with the superiority taken up by himself in the way above mentioned.

Andrew (secundus) was succeeded by his son, who again was succeeded by his son James Gibson, both of whom made up titles to the property as it stood in the person of Andrew (secundus.) During their respective possession, James Gibson and his father granted various building feus and heritable securities, and in particular James granted to the suspender Tatnall an heritable bond for £4500 borrowed money, which bond contained the usual assignation of all the granter's writs and evidents, as per a relative inventory, in which was expressly mentioned Haliburton's original disposition to be made forthcoming to the creditor when required, he giving a receipt for the same to return them within a short time.

James Gibson having been sequestrated, Reid, the trustee, paid one term's interest on this bond; but having discovered the flaw in the progress occasioned by the mistake of Andrew (secundus) having supposed that he had taken up the unexecuted procuratory in Haliburton's disposition, while it had in fact been carried by the special service of his father John, whom he had passed over, he proceeded to have James, the bankrupt, served heir in general to John; which having been done, he, as having right to the procuratory in Haliburton's disposition, in character of trustee, under the adjudication in the sequestration, which was special as to the lands in question, and in implement of which the bankrupt had granted a disposition and assignation of this procuratory, took steps to expede a charter of resignation in his own favour, without making up any feudal title in the person of the bankrupt, thereby cutting down the heritable securities granted by him while possessing under his former defective title.

The trustee having accordingly obtained a signature revised in Exchequer, Tatnall presented a bill of suspension and interdict, directed against him and his law-agents, praying to have them interdicted 'from proceeding further in using the said title-deeds, 'and procuring the said signature and charter completed.'

The Lord Ordinary having refused this bill, Tatnall reclaimed; and the cause came on to be heard the day previous to the resigning day in that term of Exchequer when the charter would have been expede.

For Tatnall it was contended, That as his heritable bond

contained an assignation to Haliburton's disposition and procuratory, on which the trustee was attempting to resign, the right to that procuratory immediately accresced to him on the service of the bankrupt to his predecessor John Gibson, and that it therefore became his writ to the extent of validating his heritable bond; that the trustee, therefore, was not entitled to make any use of it which would defeat his security; or at all events that he was entitled to have this question tried, which he would be entirely precluded from doing, if the trustee were allowed to accomplish his object; and as to the competency of the Court interfering in such circumstances, that it had been settled, in much less favourable circumstances, in the case of Kilbucho.

To this it was answered, That the trustee was entitled and bound to take every step in his power to secure the heritable estate to the creditors at large;—that the bankrupt was vested with the main right in the property, on which the creditors' right was merely a burden;—and that the trustee having taken up this right in virtue of the sequestration, followed by a disposition and assignation by the bankrupt to the procuratory, could not be prevented from using it for the benefit of the creditors by a form of procedure which was in fact an interdicting of the Barons of Exchequer from granting a charter; and that this case differed from that of Kilbucho, in so far as there were in the latter case two conveyances of the main right by voluntary deeds.

The Court unanimously passed the bill, and granted the interdict.

Lord Justice-Clerk.—We are called on here to exercise a very important and delicate function, and I confess that, in a case of this novel description, I should have wished to have had a little more time for consideration than the circumstances will permit. Nothing has been stated on the part of the trustee to show that granting the interdict will create any prejudice to the creditors; while, on the other hand, a refusal will enable him to accomplish his purpose of cutting out the suspender, or will at least lead to the necessity of much legal procedure in the way of reduction, &c. I have no doubt of the power of the Court to grant such an interdict, which was done in the case of Kilbucho; and although the proprietor of lands is undoubtedly entitled to the custody of the writs regarding the estate, yet the heritable creditor here has an assignation to them to the effect of supporting his security; and, in the special circumstances of this case, I think that the Court is called upon in equity to interfere to prevent any step being taken which will give one of the parties such an advantage in the determination of their respective rights.

Lord Pitmilly.—I am of the same opinion. There is no occasion to go deeper into the titles, than that this is a competition for the

procuratory. No doubt, the trustee is entitled and bound to try to make his rights complete; but if he does, he carries away the subject from the heritable creditors, and that is the very reason why we should interfere, which we could not be called upon to do, if things were to remain entire. The trustee will suffer nothing but delay till his right be determined, if he is really entitled to exclude the heritable creditor; and I have therefore no doubt of the competency and propriety of interfering.

Lord Alloway.—Had it not been for the case of Kilbucho, I should have doubted the power of this Court to stay proceedings in the Court of Exchequer; but it is a precedent in point, and although one party have accidentally got possession of the writ, it is the duty of the Court to interfere to prevent him availing himself of that accidental circumstance. We cannot try the merits of the rights of the two parties here, and we must therefore grant the interdict.

Lord Justice-Clerk.—In passing signatures, the Court of Exchequer act merely ministerially; but the bill steers clear of any difficulty, by merely praying for an interdict against the party using the deed.

Suspender's Authority.—Dickson of Kilbucho, March 6. 1815, (F. C.)

J. G. Hopkirk, W. S.—J. Duncan,—Agents.

No. 166. H. Monteith and Company, Suspenders.—*D. of F. Moncreiff—Monteith.*

W. Blackie, Charger.—*Skene—Donald.*

Stat. 12. *Geo. I. c.* 12. *§c.—Compensation—Manufacturer.*—Manufacturers not entitled to compensate wages due to their workmen with debts incurred by the workmen for furnishings at stores kept by the manufacturer, though such debts were voluntarily contracted after the engagement of the workers.

Feb. 2. 1827.

2d Division. Lord Mackenzie. F.

By the statute 12. Geo. I. c. 34, § 3, it is enacted, 'That every 'clothier, sergemaker, &c. shall and they are hereby obliged to 'pay unto all persons by them employed in the woollen manufac- 'ture the full wages, or other price agreed on, in good and law- 'ful money of this kingdom,' (afterwards extended to bank notes,) 'and shall not pay the said wages, or other price agreed on, or 'any part thereof, in goods, or by way of truck, or in any other 'manner than in money as aforesaid, or make any deduction from 'such wages or price for or on account of any goods sold or de- 'livered previous to such agreement by any person or persons 'whatsoever.' And it is further provided, 'That for more easily 'recovering the said wages, &c. it shall be lawful for any two or 'more Justices of the Peace to summon before them the party or 'parties so offending, and, for non-payment of such wages or price

'agreed on in money as aforesaid, or sufficient satisfaction given 'for the same to the good liking of the party or parties aggrieved, 'to issue their warrant for levying such wages, &c. by distress,' &c. These provisions, which were originally confined to the woollen manufacture, were by subsequent acts of Parliament extended to various other manufactures, and, among the rest, to that of cotton.

The suspenders, Henry Monteith and Company, are proprietors of very extensive cotton-mills at the village of Blantyre, where they also keep a store for supplying their workers with the various necessaries of life. The wages of the workers are always paid in money or bank notes, and it is entirely voluntary on their part to frequent the store of the company, where, however, they are generally allowed to take goods on credit to a certain extent.

Blackie, the charger, who had been for several years in the employment of the company, was dismissed by them in November 1822, at which time there was due him £5:2:10 of wages, while he, on the other hand, was indebted to the store for furnishings in the sum of £4:0:2¼. Having demanded payment of his wages, the company proposed to set off against them the debt due by him to the store; but this he refused to accede to, and accordingly raised an action before the Sheriff of Lanarkshire for payment of his wages. The Sheriff found 'that the defenders have 'no right to pay or compensate the said wages by furnishing of 'goods, liquors, and others, from the store at Blantyre works,' and decerned for payment accordingly. Blackie thereupon charged the company, who presented a bill of suspension, which was refused by Lord Cringletie as Ordinary, but was passed by the Court, with the view of settling the question by an authoritative judgment.

The letters having been expede, it was contended by the company, That the case of compensating wages, with a debt incurred voluntarily after the engagement of the worker, to a store belonging to the manufacturers, did not fall within the words of the statute, which was intended to prevent the workers being compelled to accept payment of wages in goods and commodities, or under deduction of any claim for goods furnished *prior* to the engagement of the worker, but that there was no prohibition against compensating the wages with a debt for goods furnished *after* the engagement; and it was further pleaded that this view of the statute was confirmed by the circumstance that an act had been passed in the year 1820, (1. Geo. IV. c. 96,) which, after narrating the previous statutes, set forth, that 'the protection in-'tended to be afforded to artificers, &c. by requiring the pay-

'ment of their wages in money or bank notes, is not effectually 'given by the provisions in the said acts contained,' and enacted, that any employer of artificers, &c. who should, after the passing of the act, 'make or impose, or cause to be made or imposed, 'any restriction or agreement, either directly or indirectly, as to 'the place or manner of expending or laying out the whole or 'any part of any wages, money, or bank notes agreed to be paid 'to such artificer, &c. or as to the person or persons with whom 'the same, or any part of such wages, &c. shall be expended or 'laid out,' should forfeit, 'in lieu of any penalty or penalties im-'posed by the said recited acts, or any of them, any sum not less 'than £10, nor more than £20,' for each offence; which act, it was said, would not have been considered necessary, had the former statutes borne the construction put upon them by the charger.

On the other hand it was contended,

That the attempt to compensate wages due to a workman with a debt incurred at a store belonging to the manufacturer, was a plain evasion of that provision of the statutes which directs that wages shall not be paid 'in any other manner than in money 'as aforesaid;' and as to the 1. Geo. IV., that it was intended to prevent a totally different abuse,—that of binding the workers to spend their wages, after they had received them, at some place favoured by the manufacturer; and that, even to this effect, it had been afterwards considered to be unnecessary, as its period of endurance was only a single year, and it had never been renewed.

The Lord Ordinary repelled the reasons of suspension, and the Court unanimously adhered.

The Lord Ordinary observed in a note:—

The inconveniences pleaded by the suspenders may afford very good grounds for the speedy repeal of the statute by the Legislature; but, while it stands unrepealed, it must be fairly interpreted and enforced. And it still seems to the Lord Ordinary impossible, under this statute, to authorize extinction of claims for wages by compensation for goods furnished at any time. If the goods are furnished after the wages are earned, it seems manifest, to sustain compensation for these goods against the wages would be just in substance to sanction payment of these wages *afterhand* in goods. A master saying to his workmen, 'I must not pay your wages in goods, but I 'will sell you goods, and then compensate your wages with the price 'of these goods,' would (however fair in point of fact his intentions might be towards the workmen) be attempting what must in law be regarded as a gross fraud on the statute, and the Court could not lend him aid in such attempt by sustaining such compensation.

Again, if the goods are furnished after the agreement of service for wages, but before the wages are earned, to sustain compensation would be just in substance to authorize payment of the wages beforehand by furnishing of goods, which is no more legal than payment afterhand by such furnishings. The only case open to doubt under the first clause was, where the goods had been sold or delivered before the agreement of service for wages took place at all, and that case is provided for expressly by an additional clause. In this case it does not seem to be explained whether the furnishings were made after the wages had been earned, or before; but this does not seem material.

LORD JUSTICE-CLERK.—This is a very important question to a large class of the community. The acts founded on by the charger are of a very salutary description, and are favourites of the Legislature, being expressly excepted in the 5th Geo. IV., which repealed the combination laws; and if ever there were statutes whose terms were unambiguous, it is these. The manufacturers are obliged to pay the wages of their workmen in good and lawful money, and are prohibited from doing it 'in any other manner of way than in money as 'aforesaid,' and the wages may be summarily levied by distress. It is the clear meaning of the Legislature that wages were to be paid in money, (afterwards extended to bank notes,) and in money alone. In the present case, it no doubt was quite optional for the workers to go to the company's store; but still, after having been allowed credit there, the setting off the debt due for goods is a manifest evasion of the act of Parliament, and would entirely defeat the protection intended to be afforded to the workmen. A great deal is founded on that part of the act which prohibits deduction for goods furnished previous to the engagement; but I agree with the Lord Ordinary that this was to meet another device for evading the statute, and can have no application here. As to 1st Geo. IV., it was enacted only for a year, and its object was to provide that if any person should stipulate, after having complied with the former statutes, by making actual payment of the wages in money, that the worker shall spend it in a particular place, he should be liable in a penalty. When we passed the bill in this case, it was not from any doubt of the correctness of Lord Cringletie's opinion, but to settle the question authoritatively.

LORDS PITMILLY and ALLOWAY entirely concurred.

J. HAMILTON, W. S.—MACK and WOTHERSPOON,—Agents.

No. 167. Rev. W. Leslie, Pursuer.—*D. of F. Moncreiff—Graham Bell—Innes.*

Earl of Moray, Defender.—*Cuninghame—Anderson.*

Prescription—Repetition—Bona Fides.—1.—A vassal being taken bound by a feu-contract to relieve the superior of the public burdens, under a qualification that the superior was to pay one fourth part thereof, but which qualification was omitted in the charter granted 20 days thereafter, and the whole burdens having been paid by the vassals for nearly two centuries—Held that they were not entitled to be relieved by the superior of one fourth of the burdens.—2.—Feu-duties in kind having, during that period, been paid by a different measure from that stipulated in the charter, Held that the superior was defended by bona fides against a claim for repetition of the excess.

Feb. 2. 1827.
2d Division.
Ld. Cringletie.
F.

By feu-contract dated in 1652, James Earl of Moray sold the lands of Balnagieth to Patrick Tulloch, younger of Bogton, and bound himself with all convenient diligence to vest and seise the said Patrick Tulloch by sufficient charter of feu-farm, containing precept of sasine in the end thereof. The feu-duty stipulated was 24 bolls of bear, (rather more than a fourth of the then rent of the lands,) 'to be mete and measured with the common 'prickmete of this nation;' and the Earl of Moray, 'as if the 'said charter was already made and expede,'—'binds and obliges 'himself' to warrant the vassal from all bygone duties and taxations, &c. up to Whitsunday 1652; while, on the other hand, the vassal binds himself 'to free and relieve the said noble Earl and 'his foresaids of all taxations, impositions, contributions, cess, 'monthly maintenance, teind duties, minister's stipend, and all 'other burdens imposed or that shall happen to be imposed upon 'the said lands of Balnagieth, teinds thereof, and pertinents of 'the same above written, after the said term of Whitsunday last 'bypast, in this instant year of God above written, and in all 'time coming thereafter,—the said noble Earl and his foresaids 'always paying and relieving the said Patrick Tulloch and his 'foresaids of the fourth part of all cess, maintenance, and all 'public impositions imposed or to be imposed on the said lands 'and pertinents of the same, according to the rate of the fourth 'part of the valued rent of the same of the instant crop and year 'of God 1652, and in all time coming thereafter.' Twenty days after the date of this contract a feu-charter was granted by the Earl, bearing to be for 'fulfilling to us and our foresaids the 'haill remanent heads, articles, clauses, and conditions mentioned 'and contained in the said contract of feu.' This charter was in the same terms as the contract, with this exception, that the qualification of the vassal's obligation of relief, in so far as re-

garded the superior's paying one fourth of the public burdens, was omitted, and a right of pasturage, not expressly mentioned in the contract, was specially granted in the charter. But otherwise the same conditions, &c. were inserted in both; and in particular the feu-duty, as set forth in the charter, was stipulated 'to 'be mete and measured with the common prickmete of this na-'tion.' On this charter infeftment was taken, and the subsequent investitures were renewed in the same terms.

It did not appear that the superior had ever been called upon to relieve the vassal of a fourth part of the public burdens, in terms of the qualification in the feu-contract; and the feu-duty, instead of being paid by the 'prickmete of this nation,' which is the Linlithgow boll, had always (so far back at least as there was any evidence) been paid according to the boll of the district, which was considerably larger than the Linlithgow boll.

The estate of Balnagieth having passed into the hands of Leslie the pursuer, he in 1822 raised the present action to have it found that Lord Moray, the descendant of the granter of the feu-contract, was bound to relieve him of the public burdens affecting the property to the extent of one fourth, and that in future the feu-duty should be payable according to the Linlithgow measure; and concluding also for repetition of the fourth part of the burdens paid during the last forty years, and of the excess of feu-duty paid during the same period.

Against this action Lord Moray pleaded in defence,

1. That under the circumstances of the case, the charter must be held to be the regulating deed, and the measure of the rights of the parties, the claim of relief provided for in the feu-contract having subsequently been departed from by the feuar.

2. That at all events this claim of relief, being a mere personal obligation, has fallen by the negative prescription, as it never has been operated on at all, or at least not for forty years; and,

3. That the superior was defended from any claim of repetition for the excess of feu-duty on the ground of bona fides.

In opposition to these defences, it was contended for the pursuer,

1. That, at the period when this feu-contract was entered into, it was the usual practice not to insert in the charter (the object of which was merely the conveyance of the feudal right) all the conditions contained in the contract; and that, taking both deeds together, there was in reality no reason to believe that the vassal had abandoned this stipulation in his favour.

2. That the obligation of relief in question, being one which became prestable yearly, and which was not dependent on or acces-

sory to any principal obligation subject to prescription, could not be lost by its not having been enforced for more than forty years; and that the case was analagous to that of the Earl of Cassillis *v.* Ross's Creditors, and several others decided in the same way.

3. That, altogether independently of the obligation in the feu-contract, a superior who stipulated, as in the present case, for a feu-duty which was in fact a fair rent for the lands at the time, was bound at common law to relieve the vassal of a proportion of the public burdens effeiring to his beneficial interest in the property, and that such obligation could not be lost by prescription, seeing it arose from the very titles on which the feu had always been possessed; and,

4. That as to the claim for repetition of the excess of feu-duty, bona fides was no defence against a condictio indebiti, which the claim really was, as otherwise there never could be repetition demanded of any debt paid and received bonâ fide, which was not the case in point of law; and further, that the 'prickmete' being described in the public statutes, the superior could not plead ignorance of the size of the measure set forth in the titles.

To this it was answered,

1. That the leaving out in the charter the qualification of the vassal's obligation of relief contained in the contract was clearly an abandonment of that qualification, more especially when joined to the circumstance of no demand having ever been made on it, so far as appeared, and of the charter conveying a right of pasturage not contained in the contract, which might have been a consideration for giving up this obligation.

2. That the distinction between those annual prestations which were accessory to a principal obligation, and those which were not so, was not well founded,—the only proper exception to the operation of the negative prescription being as to those annual prestations appearing on the face of the titles, against which prescription could not run; but, besides, that the obligation here was not of the nature of prestations independent of a principal obligation; and in regard to the case of Cassillis, that the ground of decision inserted in the interlocutor entirely took away its application to the present case.

3. That the obligation here contended for would be palpably unjust, as that share of the produce of a feu which might be a fair rent two centuries ago, would bear no proportion to the present value and consequent extent of public burdens, and that there was no authority in our law for maintaining the existence of such a burden; and,

4. That neither the vassal nor the superior had been aware, in point of fact, that the 'prickmete' was a different measure from that by which the feu-duties were paid—none of the acts of Parliament describing that measure having been printed till within these few years; and that these, therefore, were fruges bona fide consumptæ of which repetition could not be demanded.

The Lord Ordinary, for reasons explained in a note, found, '1. That the noble defender is not bound to relieve the pursuer 'of a fourth part of the public burdens affecting the lands held 'by the pursuer of the defender; and assoilzies the defender from 'that claim. 2. That the pursuer is bound by his investiture to 'pay to the noble defender a feu-duty of 24 bolls of sufficient 'bear by the prickmete of the nation;—that this mete means the 'Linlithgow boll, and consequently, that in time to come, after 'Candlemas last 1824, the pursuer is only bound to pay the said 'number of bolls measured by the standard Linlithgow boll; but 'that, in consequence of the bona fides of the defender and his 'predecessors receiving payment by the Elgin measure for greatly 'above 100 years, he is not liable to repay or account to the pur-'suer for the difference between the two measures in time past, 'and assoilzies the defender from that claim.'

To this interlocutor the Court (June 28. 1825) adhered; and, on advising a reclaiming petition, with answers, again adhered.

The Lord Ordinary observed in a note:—

The Lord Ordinary heard the counsel for the parties on the 28th instant, since which he has attentively considered what was then argued, and has consulted the authorities to which they made reference. The following results from his deliberations.

The first point was, Whether the charter 24th December 1652, granted in implement of the feu-contract 4th December of the same year, altered the terms of that contract? On looking into the case of the Duke of Buccleuch against the Officers of State, 1st February 1770, it is thereby proved that the stipulation for payment of feu-duty, contained in a charter from the superior to the vassal, and that investiture having been renewed for above the prescriptive period, constitutes an obligation upon the vassal to pay these feu-duties, although in fact they had never been paid from the date of the investiture. The reasons of exemption from payment of these feu-duties were somewhat, though not precisely, similar to the present case; yet, after the most mature consideration, the Court found the vassal liable for the feu-duties. Now, in this case, the charter 24th December 1652 by the Earl of Moray was granted to the pursuer's predecessors, under the burden of a feu-duty of 24 bolls sufficient bear, to be 'mete and measured by the common prickmete of this

'nation,' &c., without any stipulated deduction therefrom; and it is not denied, nay it is admitted, that the feu-duty has been paid ever since by the measure of the county of Elgin without deduction. The feu-duty, therefore, is undoubtedly due.

The next step then is, Whether this charter and usage of payment has secured the continuation thereof to the noble defender? By the feu-contract 4th December 1652, Patrick Tulloch, one of the parties, and author of the pursuer's predecessors, bound himself to pay all public burdens, specified in an extensive enumeration of them, after Whitsunday 1652, 'the said noble Earl always paying and relieving the said Patrick Tulloch and his foresaids of the fourth of all cess, maintenance, and of all public impositions whatsoever, imposed or to be imposed on the said lands and pertinents of the same, according to the rate of the fourth part of the valued rent of the same, of the instant crop and year of God 1652, and in all time coming thereafter.' No such obligation as this is to be found in the charter following on and in implement of this feu-contract, and no such relief or claim of it has been given or made since the date of the charter. But it was ingeniously pleaded by the pursuer, that the intention of the parties was to make this only a personal claim against the Earl of Moray and his heirs, and as it is an obligation for an yearly payment of a fourth part of the public burdens, it was pleaded that it cannot be cut off by the negative prescription, more than the right to feu-duties or teinds can be lost by prescription. The Lord Ordinary, however, cannot assent to this doctrine. The reason why feu-duties and teinds do not prescribe, in so far as respects the right of demanding them, is, that no man can prescribe a right in opposition to the title under which he holds a subject. Teinds are a burden on lands by the public law of the country, feu-duties under the charter by which a man holds his lands. Each year's teinds or feu-duty becomes a debt, and is cut off by the lapse of forty years; but the right itself under which teinds or feu-duty is due remains. Here the right under which the pursuer holds his lands is the charter and infeftment, under which he is bound to pay his feu-duty, while the obligation under which he claims deduction of a fourth is a mere personal stipulation in a separate deed. The right of exacting the full feu-duty without deduction is secured by positive prescription, arising from the right itself, and possession of near 200 years, while the personal stipulation is cut off by the negative prescription, built too on the presumption that the stipulation was departed from at the time that the charter was granted. The case of the Earl of Cassillis against the Creditors of Hugh Ross, 3d February 1796, Mor. p. 10756, is very illustrative of the present. The circumstances, indeed, are very nearly similar, with this exception, that feu-duty was never once paid. The superior stipulated a feu-duty of 52 merks yearly; but in order to relieve the vassal, he obliged himself to grant him a right of annual rent out of his

lands to the same amount. In the charter the feu-duty of 52 merks was stipulated, without notice of the discharge by means of the right of annual rent, and no right of annual rent, however, was granted. This was in 1614, from which period down to 1787 no feu-duty was paid. In this last-mentioned year, Mr. Ross' estate having been in the hands of creditors, the feu-duty was demanded, and the Court refused to find it payable. But on what ground was this? On the ground solely that not one farthing of the feu-duty had ever been paid, whereby the personal obligation was preserved in force. But if the feu-duty had been paid for above 100 years, as in this case, the only reason of the judgment was removed.

The last point is the meaning of the words, 'the common prick-'mete of the nation,' by which the 24 bolls of bear are to be paid. The Lord Ordinary is satisfied that these words mean the Linlithgow boll, and thinks that this is completely established by the act of Parliament, printed 1587, c. 115, and by the proceeding quoted in the statutes edited by Mr. Thomson, Vol. V. p. 425, where this measure is mentioned by the Earl of Galloway in a complaint to the King and Parliament against the burgh of Wigton in 1641. The consequence of this appears to be, that the pursuer can be liable only for 24 bolls of bear by the Linlithgow measure in time to come. Put the case, that his charter stipulated a feu-duty of £10 sterling yearly, and that he had paid £12, no length of payment of this erroneous feu-duty could make it exigible after the error is discovered. In the same way, if it be clear that payment by the prickmete of the nation means the Linlithgow measure, (which the Lord Ordinary thinks it does,) no length of the time during which payment has been made by a larger measure can lay an obligation upon the pursuer to continue paying by the larger measure. The Lord Ordinary, however, is clearly of opinion that the bona fides of receiving payment for 170 years past is a good defence against a claim for repayment of the bygones prior to Candlemas 1824.

Lord Glenlee.—It is not necessary to pay much attention to the difference between the feu-charter and the contract. The burden on Lord Moray is but an annexed qualification of the obligation on the feuar to relieve his Lordship, providing that to the extent of one fourth Lord Moray is not to claim relief, or that he is only to be entitled to relief of three fourths of the public burdens. At that period Crown vassals alone were liable in such burdens; and the cess, such as it exists at present, was unknown till 1657. The whole burdens being thus by the contract thrown on the vassal, the relief came to be by the superior to the extent of three fourths; but the clause is quite inexplicable as it stands to present circumstances, and it plainly must be understood that the object of it has been accomplished otherwise. There is no sense, therefore, in applying the doctrine of prescription, and saying that each year's burden must run a separate course; and as to the claim of repetition, the plea of bona fides

completely applies. I therefore think the interlocutor right on both points.

LORD ROBERTSON,—(who was on the Bench at the first advising.)—I also think the interlocutor right. The feu-contract was superseded by the charter, and the obligation in the former was never insisted on. My only difficulty was as to the surplus feu-duty. It may be said that the charter being the measure of the right, Lord Moray could not bonâ fide take more; but then the local measures had always been universally used, notwithstanding the act of Parliament; and I therefore think that Lord Moray must be held to have been in bonâ fide.

LORD PITMILLY.—I am of the same opinion. Even if the matter had rested on the feu-contract, I should have thought the interlocutor right; but the terms of the charter granted twenty days afterwards puts the question beyond doubt. It is the charter, and not the contract, which must regulate the rights of parties here; so that, if there had been no prescription at all, the superior would have been free of his obligation of relief; but his right is certainly fortified by prescription.

LORD ALLOWAY.—I am also for adhering; but had there been no prescription, my opinion would have been different.

LORD JUSTICE-CLERK.—When this reclaiming petition was given in, I wished to look into the case of Gartshore *v.* Fleming, which at first sight might appear to be an authority in favour of the pursuer. But there is this marked distinction, that in that case there was no contrary payment; while here, though there was always an interest in the pursuer's predecessors to insist on the obligation in the contract, they nevertheless paid the whole burdens during all the long period which has elapsed. Lord Glenlee's observations as to the nature of the cess at the date of the contract are very important, and lead to the conclusion, that the parties intended in the charter to settle matters on a different footing, which is the more probable, as a right of pasturage was conferred in the charter not contained in the contract.

Pursuer's Authorities.—(2.)—3. Ersk. 7. 13; Blair, Feb. 7. 1672, (11236); E. of Cassillis, Feb. 3. 1798, (10756); Gartshore *v.* Fleming, Feb. 4. 1813, (not reported, noticed in papers of case next quoted); Low *v.* Bethune, Dec. 2. 1820, (F. C.)—(3.)—Feuars of Kinross, Dec. 7. 1693, (13071); Treasurer of Edinburgh, Feb. 25. 1696, (4188); Anstruther, Dec. 9. 1779, (10713); Mill, Feb. 7. 1794, (10715.)—(4.)—3. M'Kenzie's Inst. 1; 7. Wallace's Pr. 8. 51; L. 26. § 5. D. de Cond. Indeb.; 1587, c. 15.

Defender's Authorities.—(1.)—M'Lachlan, May 14. 1823, (ante, Vol. II. No. 281.)—(2.)—1469, c. 28; 1617, c. 12; 2. Stair, 12. 16; 17. Kames' Elucid. p. 251; 2. Bank. 12. 12. and 18. 19; Beadmen of Magdalene Chapel, June 30. 1671, (11148); Countess of Rothes, Jan. 1. 1685, (11255); Stewart, July 6. 1711, (10722); Graham, Feb. 7. 1735, (10745); Tarsappie, March 4. 1685, (10770); Magistrates of Linlithgow, June 21. 1822, (ante, Vol. I. No. 564.)—(3.)—Duke of Montrose, July 13. 1711, (13073.)

T. INNES, W. S.—J. WAUCHOPE, W. S.—Agents.

D. ALLAN, Pursuer.—*Pitt Dundas.* No. 168.
HIS CREDITORS, Defenders.—*Carlisle.*

Cessio.—Held not necessary, in peculiar circumstances, for the pursuer of a cessio, against whom a writ of extent had issued, to call the Officers of the Crown as defenders.

Feb. 3. 1827.
1ST DIVISION.

ALLAN, who had been a commissary-general in New South Wales, brought a process of cessio, which he was repeatedly prevented from pleading, by its being objected that all the creditors had not been called. After he had obviated this by calling them, it was objected, that as he was indebted to the Crown, and as a writ of extent had issued, the Officers of State ought to have been made parties. The Court, in the particular circumstances of the case, repelled the objection.

The Judges seemed to think the objection attended with much difficulty, and were at first disposed to sustain it; but considering that the pursuer had not been justly treated by the mode in which his creditors had conducted their opposition, they allowed him to plead his case.

E. GORMAN, Suspender.—*A. M'Neill.* No. 169.
J. W. HEDDERWICK, Charger.—*W. Bell.*

Meditatione Fugæ Warrant.—Held not a sufficient ground for liberating a party incarcerated on a meditatione fugæ warrant, till he should find caution judicio sisti in any action to be brought against him within six months, that the creditor had delayed to do so for four months; but having alleged that he was merely going out of the country on a periodical journey in the course of his business, a reservation made to him to apply to the Judge incarcerator for a re-examination and investigation as to that matter.

Feb. 3. 1827.
1ST DIVISION.
Bill-Chamber.
Lord Craigie.
H.

GORMAN, having been incarcerated on a meditatione fugæ warrant, granted by the Sheriff of Lanarkshire, till he should find caution judicio sisti in any action to be brought by Hedderwick against him for payment of a debt of about £5, presented a bill of suspension and liberation, in which he stated that he was a spirit-merchant in Glasgow, and also a dealer in old clothes, in which latter occupation he had occasion to go frequently to Ireland; that when apprehended he was proceeding there in the course of his business, and not to avoid payment of his debt; that from the hurried manner in which his declaration had been taken, he had not been allowed to explain these circumstances; that although nearly four months had elapsed, Hedderwick had only

recently raised his action, which he (Gorman) did not intend to resist; that if Hedderwick had taken his decree at an earlier period, and detained him on civil diligence, Gorman might have got his liberty by a process of cessio, which at present he could not accomplish; and therefore, that, in the whole circumstances, he ought to be liberated.

To this it was answered, That it was proved by Hedderwick's oath, and the declaration of Gorman, that there were sufficient reasons for requiring him to find caution, and that as six months had not elapsed, there was no ground for relieving him from prison, if he did not think fit to find caution. Lord Craigie passed the bill simpliciter,—'in respect of the long delay on the 'part of the chargers to commence their action against the sus-'pender, and the trivial extent of the debt, which was generally 'admitted by the suspender; and also that the complainer by 'the delay has been for some months prevented from obtaining 'his liberty in consequence of a process of cessio bonorum.'

Hedderwick having reclaimed, the Court altered, and refused the bill, reserving to Gorman to apply to the Sheriff for a re-examination.

Lord Balgray.—I see no grounds on which, consistently with law, we can interfere with the rights of this creditor. If Gorman did not sufficiently explain himself in his re-examination before the Sheriff, he has himself alone to blame, but he may apply to be re-examined.

Lord Gillies.—We cannot pass this bill, except on the footing that the examination has not been properly taken. We have, however, no evidence of that. If Gorman was going merely on a periodical journey in the course of his business, I do not think that would have been a ground for a warrant as in meditatione fugæ. He may apply to the Sheriff to be re-examined on that subject, but in hoc statu we cannot interfere.

Lord Craigie.—In passing this bill, I went on the ground that the exacting of caution is not required by statute, but is an equitable interference of the law on behalf of the creditor, and that, as it appeared to me that the right had been abused by this party, we were bound in equity to give redress.

T. Ker, W. S.—J. Malcolm,—Agents.

A. CHRISTIE, Petitioner.—*Baird.* No. 170.

Nobile Officium—Factor.—Court declined to appoint a factor to execute the purposes of a trust, in room of a trustee who had become insolvent, on the application of the truster alone; but did so on the concurrence of a party beneficially interested under the trust having been obtained.

THE petitioner Christie, in 1820, executed a conveyance of certain heritable property to Pattison and two others, in trust, for the purposes, 1. Of paying his lawful debts; 2. Of paying to him the rents for his liferent use allenarly; and, 3. Of selling the subjects after his death, and paying certain provisions, and dividing the remainder among the residuary legatees set forth in the deed. Pattison was declared to be the sole trustee for executing the purposes of the trust during Christie's life, and he, with the two others, were regularly infeft under the trust-deed; but on his having become insolvent, and having executed a trust-disposition of his own estate, Christie presented a petition to the Court, praying to have a factor appointed to execute the purposes of the trust in his place. This the Court declined to grant on the application of Christie alone; but one of the residuary legatees having afterwards concurred in it, their Lordships, in respect thereof, granted the prayer of the petition.

Feb. 3. 1827.
2D DIVISION.
F.

J. LIDDLE, Agent.

P. BORTHWICK, Pursuer.—*Sol.-Gen. Hope—H. Bruce.*
R. WRIGHT and Others, Defenders.—*D. of F. Moncreiff—Buchanan.* No. 171.

Bankrupt—Stat. 1696, *c.* 5.—A partner and manager of a company having discounted bills belonging to the company for its behoof, and being indebted privato nomine to the company in a sum which he ought to have paid or entered to that effect in his account with the company, and having retired the bills within 60 days of his bankruptcy as an individual, whereby his debt to the company was extinguished, and of which he made an entry in their books—Held, that as it was his duty prior to the 60 days to have paid the debt, whereby funds belonging to the company were in his hands as manager sufficient to retire the bills, the transaction was not reducible on the act 1696, c. 5.

IN the month of May 1815, a company was formed under the firm of Saunders and Company, wood-merchants in Leith, of which the partners were John Saunders junior, Robert Wright, William Traquair, Robert Dodson, and John Heiton. Saunders was a partner to the extent of one half of the whole, and had the

Feb. 6. 1827.
1ST DIVISION.
Lord Eldin.
H.

exclusive administration of the funds as manager of the company. In the course of their trade the company became creditors of three separate parties, Buck, Lamb, and Findlay, to the extent of £360 17s. 8d., on each of whom they drew bills for the amount of their respective debts, which were accepted, and were payable on the 27th and 29th December 1820.

In the month of April of that year the company was privately dissolved, and in October this was announced to the public. The winding up of its affairs was intrusted to Saunders, who, in the course of doing so, discounted the above bills in name of the company, and received the proceeds, which he entered in the company books. When these bills were about to fall due in December, and it was known that they would not be paid by the acceptors, they were retired by Saunders.

At this time Saunders stood indebted to the company in this manner. He had purchased from them, in the month of April, timber and utensils to the amount of upwards of £300, and was otherwise accountable for funds belonging to the company, to an extent which, including the above sum, made him their debtor for £396. Accordingly in his private books he had debited himself with that sum; and when he retired the above bills, amounting to £360: 17: 8, he placed that payment to his own credit, and made similar entries in the books of the company. The effect of this was to extinguish pro tanto the sum of £396 for which he was accountable to the company. His estates were sequestrated on the 15th of January 1821, being 16 days from the date of retiring the bills; and Borthwick, having been appointed trustee, brought an action of reduction and repetition on the acts 1621, c. 18, and 1696, c. 5, and on the common law, against the defenders, the other partners of the company.

In support of this action he maintained,

1. That as the bills had been retired by Saunders out of his own private funds when in bankrupt circumstances, for behalf of his partners, who were conjunct and confident persons, without any just or necessary cause, the payments made by him were struck at by the above statutes.

2. That as the bills were due to, and not by the company, and as his name did not appear upon them as a private individual, and as they had been retired by him in that capacity, he had acquired right to them, and therefore he was not entitled to deliver over the bills to his partners, but ought to have retained them for behoof of his private creditors, in order to be recovered from the acceptors or the company as the drawers; and,

3. That the entry in his books for behoof of that company having been made within 60 days of his bankruptcy, was a fraudulent attempt to give a preference to his partners.

To this it was answered,

1. That it was the duty of Saunders, as manager of the company, and by whom the bills were discounted, to retire them when they fell due; and as at this time he was possessed of funds which belonged to the company, and for which he himself was accountable, it must be held that he had retired the bills out of these funds, and not out of his own private estate; and,

2. That as, at all events, it was a payment in cash, the transaction was not liable to be set aside.

The Lord Ordinary decerned in terms of the libel; and the defenders having reclaimed, the Court appointed them, before answer, 'to lodge a condescendence, stating what sum of the company's funds they allege to have been in the hands of the said 'John Saunders at the time of retiring the bills in question, and 'of what such funds consisted;' and thereafter remitted to an accountant to examine the books of the concern, and report upon the points in dispute. A report was accordingly given in, from which it appeared, 1st, That immediately after the dissolution in April, Saunders had become indebted to the company, or accountable to them, for the above sum of £396, which ought to have been paid by him, but that he had never made any entry as manager of the company in his cash-book of his having paid that sum till the 30th of December 1820; and, 2d, That if he should be held to have paid that sum when due, he had funds in his hands belonging to the company sufficient to retire the bills.

On advising this report, the Court altered, and assoilzied the defenders; but found no expenses due.

Lord Balgray.—When this case first came before us, I was impressed with the idea that this was a collusive proceeding among the partners to obtain a preference; but the report shows that this was not the fact. As matters are now explained, I cannot see any legal grounds on which to reduce this transaction. Saunders was the manager or trustee for winding up the affairs of the company, and it was his duty to take up these bills by means of the funds which were in his hands belonging to the company. The question therefore comes to be, whether, at the period of retiring them, he was possessed of funds belonging to the company? It appears that in his private capacity he was debtor for sums to the company which he ought to have paid prior to the period of 60 days from his bankruptcy; and it

was therefore his duty, as manager of the company, to have recovered that sum; or, in other words, to have entered it as having been then paid by him to the company. If he had done so, there would have been no room for this question; and I apprehend that we are bound to hold that although he did not make that entry, yet that he thenceforth held that sum in his capacity of manager of the company. If so, then he had sufficient funds in his hands when the bills fell due out of which to retire them, and it was his duty to do so. As, therefore, there is no offer to prove that there was an actual fraud, we must assoilzie the defenders.

Lord Craigie.—This is a very nice case, and I was disposed to adhere to the judgment of the Lord Ordinary; but my opinion has been a good deal affected by that delivered by Lord Balgray.

Lord Gillies.—It is admitted that Saunders was the manager and cashier of the company; and it is also admitted that he made purchases, the price of which was payable prior to the 60 days. If it had been due by a third party, he was bound forthwith to have recovered payment; and as it was owing by himself, we must hold that he performed his duty. According to the view of the accountant, all that was requisite in order to this was, that he should have made an entry in the books, in which case he states that there could be no objection to the transaction. Saunders, however, did not do so, and therefore the whole case turns upon the effect of his omission to make that entry. But it was his duty to have made it, and he must be considered to have held the funds as from that period in his character of manager. If so, there is no longer any question here, because it is admitted that he was entitled to retire these bills out of the funds of the company.

Lord President.—I can easily understand, that if the cashier of a bank or a company be possessed of funds in the company chest, or which have actually come into their possession, his bankruptcy will not prevent him from applying them to the payment of their debts; but my difficulty is this:—Saunders was indebted to the company in his private capacity, and on his bankruptcy they could only rank as common creditors. He did not purchase the goods as manager of the company; he sold them no doubt in that capacity in winding up their affairs, but he purchased them as a private individual. He could not be both purchaser and seller; he was therefore just an ordinary private debtor to the company. Now, he did not pay his debt, or take any measures in relation to doing so till within the 60 days, when he accomplished it in the manner set forth in the pleadings. It is said, however, that he ought to have made the entry prior to that period, and therefore he must be held to have done so; but I can make no distinction between an entry and payment. If he had paid the debt prior to the 60 days, there could have been

no objection; but it is because he did so within the 60 days that it is struck at by the statute. On the same principle, the entry within that period renders the transaction liable to be set aside.

Pursuer's Authorities.—2. Bell, 225. 256; Barbour, May 30. 1823, (ante, Vol. II. No. 335); Blaikie, March 1. 1798, (887.)

Defenders' Authorities.—2. Bell, 209. and Cases there, and 225.

W. Cook, W. S.—J. Pedie, W. S.—Agents.

J. Sharp, Pursuer.—*Skene.*
D. M'Gowan, Defender.—*D. of F. Moncreiff—Brownlee.*

No. 172.

Feb. 6. 1827.

1st Division. Lord Eldin. D.

This was a special case, in which the Lord Ordinary and the Court decerned against M'Gowan.

T. Baillie,—W. Hunt, W. S.—Agents.

Mrs. Lindsay or M'Gowan and her Son.—*Sol.-Gen. Hope—M'Neill.*
Sir R. Henderson and Others, (Anstruther's Trustees.)—*Jameson—Walker—Makgill.*

No. 173.

Legacy.—Circumstances under which it was held that two legacies of the same amount, in separate deeds, in favour of the same party, were both due.

Feb. 6. 1827.

1st Division. Lord Meadowbank. H.

The late John Anstruther, Esq. of Arditt, executed, on the 21st of June 1805, a mortis causâ bond, whereby he provided in favour of his natural daughter, Mrs. Lindsay or M'Gowan, an annuity of £25, and a sum of £500 to her children. On the 22d May 1807 he added a codicil to the bond, by which he gave to her a further annuity of £50, declaring that it was 'in addition 'to the above provision of £25 per annum.' In 1812 he executed a trust-disposition and deed of settlement in favour of Sir Robert Henderson and others, by which he conveyed to them his estate of Winkston and others in Peebles-shire, and his whole other estates and effects, (with the exception of that of Arditt, which he disponed by a separate mortis causâ deed to his mother,) for payment of his debts, and of various legacies and provisions. By this deed he, inter alia, provided that the trustees should pay to Mrs. M'Gowan a legacy of £100 to herself, £200 to her husband, and further an annuity to her of £100, and should secure the principal sum of £2000 to her children; and he then declared, that 'in the event of the above provisions taking effect in 'her favour, and in favour of her children, by this being an effec- 'tual deed, that it is in full of and in place of the provisions for-

'merly made by me in her favour, by bond of annuity dated the '21st day of June 1805, and codicil in my own handwriting 'thereto annexed, dated the 22d day of May 1807 years, which 'bond and codicil in such case shall be of no effect.' In this deed there was no prohibition against the annuity being assignable, and it was declared in relation to the sum of £2000, that it should be divisible among the children in such proportions as Mrs. M'Gowan should appoint by a writing under her hand; failing which, to be divided among them at the first term of Whitsunday or Martinmas after her death.

In 1814, after his mother's death, Mr. Anstruther cancelled the disposition of the estate of Arditt in her favour by deleting his name, and at the same time struck out the name of one of the trustees from the trust-deed by scoring it with a pen. Thereafter, in 1818, and while the trust-deed was in his own possession, he executed a mortis causâ bond for an annuity of £100 in favour of Mrs. M'Gowan, and of the principal sum of £2000 in favour of her children. The obligatory clause was in these terms: —'I bind and oblige myself, my heirs, executors, and successors 'whomsoever, without regard to their order of priority, and with-'out the benefit of discussing one heir for the relief of another, 'to make payment,' &c. In regard to the annuity, he provided that it should 'not be assignable or transferable by her to any 'person whatever for any time, however short or long, and that 'assignees, legal or voluntary, shall be, as they are hereby ex-'pressly secluded.' In regard to the £2000, it was directed to be paid to the children 'at the first term of Whitsunday or Mar-'tinmas after their mother's death, they having arrived at the 'years of majority, and if the child or children, or any of them, 'shall not have arrived at that age at the time of their mother's 'death, then the term of payment to be at the first term of Whit-'sunday or Martinmas after they attain that age respectively;' but declaring, that 'if any of the children shall decease before 'the term of payment, leaving lawful issue, such issue shall suc-'ceed to the parent's share;' and 'in the event of the child or 'children dying in minority, without lawful issue of their body 'or bodies, the performance of these presents shall not be exi-'gible by their heirs, executors, or assignees, but the said sum 'shall remain part of my estate, and belong to my own heirs 'and assignees, without prejudice, nevertheless, to the child or 'children's right to the annual rent of said sum which shall have 'become due during the lifetime of the said child or children.'

At the same time Mr. Anstruther executed a bond for £500 in favour of her husband John M'Gowan, who, in 1819, made a

mortis causâ disposition of his estate of Winkston in favour of Mrs. M'Gowan in liferent, and her children in fee, declaring 'that these presents shall not infringe, derogate from, or be con-'strued as having come in place of any obligation or provision I 'have already made in favour of the said Rachel Lindsay, and 'that my debts and obligations of every description shall not 'affect the foresaid lands and others, or these presents, but shall 'be paid and satisfied out of my other lands and estates.' He died a few months thereafter, having previously delivered the trust-deed of 1812 to Mrs. M'Gowan. He left no lawful issue, and it appeared that his funds had been gradually accumulating from 1805, and that they amounted at his death to upwards of £80,000.

Thereafter an action was brought by the heirs at law of Mr. Anstruther for setting aside the trust-deed of 1812, on the ground, inter alia, of its being vitiated by the name of one of the trustees being obliterated; but the Court sustained the deed as valid and effectual. (See ante, Vol. I. No. 575.)

A multiplepoinding having been then brought by the trustees, Mrs. M'Gowan and her husband claimed both the annuity of £100 and legacies in the trust-deed of 1812, and those in the bond of 1818, and her son and only child also claimed the two provisions of £2000 contained in these respective deeds. On the other hand, the trustees maintained that the provisions in the bond of 1818 superseded those in the trust-deed of 1812; so that the question came to be, Whether only one or both of these provisions were due?

In support of their claim, Mrs. M'Gowan and her son contended,

1. That as the provisions were contained in separate deeds, and as the one was not declared to be in place of the other, they were both due.

2. That as the provisions contained in the deed 1812 consisted both of a legacy and of an annuity, against transferring the latter of which there was no prohibition, and as in the bond of 1818 there was no legacy provided, and the annuity was declared not to be transferable, and as the sum of £2000 granted by the former of these deeds was payable at a different period, and might go to different parties from that conveyed by the bond, the provisions must be held to be different in quantity and quality, and therefore both due; and,

3. That as Mr. Anstruther's fortune had been gradually accumulating, and as his affection for Mrs. M'Gowan and her children was evidently increasing, it was to be presumed that he intended all those provisions to be payable to them, which he had not declared should be in satisfaction of others.

On the part of the trustees it was pleaded,

1. That the question was to be decided on the same principles, and by the same rules, upon which provisions by a father to his children are governed; and that in these cases a provision, not specially declared to be additional, is held to be in satisfaction of prior provisions.

2. That the whole circumstances, and particularly the conveyance of Winkston, (which was part of the fund intended for payment of the provisions in the deed 1812,) proved that Mr. Anstruther did not intend that they should both be exigible; and,

3. That even if the provisions could be regarded as legacies, there were no sufficient grounds for holding that both were due.

The Court, on the report of the Lord Ordinary, found 'that 'the legacies and provisions in favour of Mrs. Rachel Lindsay or 'M'Gowan, and John M'Gowan her husband, and the children 'of the said Rachel Lindsay or M'Gowan, contained in the trust-'deed of 3d August 1812, are not superseded or affected by the 'bond in their favour of date 21st March 1818, and that they 'are entitled to the benefit of the sums and provisions contained 'in both deeds, and to be ranked accordingly: Repelled the ob-'jections stated by the raisers of the multiplepoinding relative to 'the provisions in favour of the said defenders, and decerned; 'but found no expenses due.'

The Judges were of opinion, that as the provisions had been left by separate deeds, and as they were different both in quantity and quality, and as the funds of the testator were gradually accumulating, and his affection for his natural daughter and her family increasing, and as there was no predilection shown for his heirs at law, and no declaration that the provisions of 1818 should be in satisfaction of those contained in the deed 1812, (in which he had inserted a declaration as to those previously granted,) and he had conveyed the estate of Winkston under a declaration that it should be in addition to all his former provisions, it must be presumed that he meant both to be payable.

M'Gowan's Authorities.—1. Stair, 8. 2; 4. Stair, 45. 17; 3. Ersk. 3. 93; 2. Vin. 20; Voet. l. 30. and 34; 1. Roper, 491; Toller, 396; 4. Bacon Ab. 361; 2. H. Blacks. 213; Stirling, June 20. 1704, (11442); M'Intyre, March 1. 1821, (F. C.); Elliot, Feb. 27. 1823, (ante, Vol. II. No. 226); Clark, May 16. 1823, (ante, Vol. II. No. 292.)

Trustees' Authorities.—Wallace, Nov. 13. 1624, (11440); Burnett, Feb. 24. 1709, (11467); Belches, Dec. 22. 1752, (11361); 4. Stair, 42. 21; 1. Bank. 2. 61; 3. Ersk. 9. 14; Toller, 334.

J. YOUNG, W. S.—J. HERRIOT, W. S.—Agents.

Mrs. Fraser, Pursuer.—*Skene.*
N. F. Fraser, Defender.—*D. of F. Moncreiff.*

No. 174.

Title to Pursue — Interdiction. — Circumstances under which it was held, — 1.—That the tutor of a pupil was entitled to pursue a reduction of a lease, although inventories had not been made up;—and,—2.—That a lease granted by a liferenter under interdiction in security of a debt, in favour of one of his interdictors, and which was consented to by the other interdictors, was liable to be reduced.

Feb. 6. 1827.

1st Division.
Lord Medwyn.
H.

On the 24th of October 1761, Francis Fraser (primus), proprietor of Findrack, with consent of his wife Catherine Gordon, on occasion of the marriage of his son Francis Fraser (secundus) with Miss Herietta Baird, entered into a contract, to which they were all parties, whereby he bound and obliged himself, 'as soon 'as conveniency will allow, to make up and establish in his per-'son all legal and proper titles, by service, precepts, charters, in-'feftments, or otherwise, to the said lands, mills, and others after 'mentioned, and thereafter to make, grant, and subscribe, and 'deliver to the said Francis Fraser younger, and the said He-'rietta Baird, his apparent spouse, and to the said Catherine 'Gordon, in manner and with the reservations and burdens after 'specified, dispositions thereof, containing procuratories of resig-'nation, precept of sasine, and other usual clauses, with all ne-'cessary securities extended in ample form; likeas now as then, 'and then as now, and as if the said rights were already made 'up, the said Francis Fraser elder has given, granted, alienated, 'and disponed, as he, by these presents, from him, his heirs and 'successors, but with the reservations, burdens, and conditions 'always after expressed, gives, grants, alienates, and dispones to 'and in favour of the said Francis Fraser younger, and the said 'Catherine Gordon and Herietta Baird, but for their securities 'only of their foresaid liferent annuities of £600 Scots, to which 'each of them are provided during all the days of their lifetime, 'and to the heirs-male of the said Francis Fraser younger his 'body; which failing, to the heirs-male of the said Francis Fraser 'elder his body, of his present or any subsequent marriage; 'which failing, to the heirs-female of the said Francis Fraser 'younger his body of his present marriage; which failing, to 'the said Francis Fraser elder his heirs or assignees whatsoever, 'heritably and irredeemably, but any manner of reversion, re-'demption, or regress for ever—all and haill the town and lands 'of Findrack,' &c.,—'as mentioned in the said Francis Fraser 'elder his rights and infeftments thereof, and lying within the 'parishes,' &c.;—'reserving always to the said Francis Fraser

'elder his liferent, during all the days of his lifetime, of one just 'and equal half of the whole rents, profits,' &c. He also bound himself to infeft 'the said Catherine Gordon and Herietta Baird 'in liferent, but only for security of their respective liferent an-'nuities of £600 Scots above specified; and the said Francis 'Fraser younger, and the heirs-male of his body, which failing, 'the other heirs above described, under and upon the conditions, 'provisions, and reservations always above specified;' and a precept of sasine and procuratory of resignation were granted to that effect. In virtue of the precept, sasine was taken in 1772 in favour of the respective parties therein mentioned.

Francis Fraser (primus) died soon thereafter, and his son Francis Fraser (secundus) thenceforth possessed these lands under these titles till July 1808, when he executed a disposition, with consent of his eldest son, Lieutenant Francis Fraser, 'to and 'in favour of myself in liferent, and after my death to the said 'Francis Fraser, my son, in liferent, but for his liferent use only, 'and to the heirs whatsomever of his body, in fee; whom failing, 'to William Fraser, my second son now in life,' &c. But he empowered his son Lieutenant Fraser 'to set tacks of the said 'lands for any space not exceeding nineteen years from the com-'mencement, or twenty years from the date of such tack, provid-'ed no grassums or entry-money be taken from the tenants.'

In December 1809 Francis Fraser (secundus) died; and his son Lieutenant Fraser was, on the 25th of the same month, infeft in virtue of the above disposition, and thereafter the titles were completed by a charter of confirmation.

In October 1814 Lieutenant Fraser executed a bond of interdiction against himself in favour of his wife, Charles Winchester, and the late Francis Fraser, S. S. C., which was duly published. Prior and subsequent to this period, Mr. Francis Fraser had made advances on behalf of Lieutenant Fraser, and was his creditor under certain business accounts to the extent of £795, which were attested by him, his wife, and Charles Winchester. In security of this sum, it was arranged that Lieutenant Fraser, with consent of his interdictors, should grant a lease to Mr. Francis Fraser of the lands of Findrack, and that the latter, on the other hand, should grant a back bond explanatory of its true nature. At this time the whole of the lands had been let to other tenants, and the real object of the lease was to operate as an assignation of the rents. Accordingly, in the month of August 1819, Lieutenant Fraser, 'with the 'special advice and consent of Mrs. Garden Winchester or 'Fraser, his wife, and Charles Winchester, advocate in Aber-

'deen, who, with Francis Fraser, writer in Edinburgh, are the 'voluntary interdictors of the said Francis Fraser of Findrack,' let to Mr. Fraser, S. S. C., the lands of Findrack, in consideration of a rent of £150, for the period of nineteen years, 'with 'full power and liberty to receive and discharge the yearly rents 'and tack-duties due and exigible for such part or parts of the 'said lands as may be under lease.' A factor was then appointed by mutual consent to account to Lieutenant Fraser for the rent of £150, and to Mr. Fraser for the surplus.

By a deed of settlement in 1818, Lieutenant Fraser nominated his wife, Mr. Fraser, and a Mr. Strachan, or the acceptors or acceptor, to be tutors and curators to his children; but, before his death, he drew his pen through Mr. Fraser's name. He died in 1824, having executed another deed of settlement, by which he appointed his wife to be his sole executrix and universal legatee, in which character she gave up an inventory, and was confirmed.

He left a son in pupillarity, who was served heir of provision in general to his grandfather Francis Fraser (secundus) under the disposition of July 1808. His mother then, in the character of his tutor, and as executrix of Lieutenant Fraser, brought an action of reduction of the tack against the heir and representative of Mr. Fraser, who was now dead. In support of this action she maintained,

1. That the lease was null and void, because it was granted by an interdicted person in favour of one of his interdictors, and was executed by a majority of the interdictors, whereas no such power was given to a majority; and,

2. That at all events it expired by the death of Lieutenant Fraser, who was merely a liferenter, and was prohibited from granting leases on condition of receiving grassum or entry-money, whereas the lease in question was given in consideration of a loan or advance of money.

To this it was answered,

1. That the pursuer, as executrix nominate, had no title to pursue a reduction of a lease, and that the deed on which she founded, as entitling her to sue as tutor of her son, was vitiated by the name of Mr. Fraser being deleted; and at all events she had not made up inventories as tutor in terms of the statute 1672, c. 2.

2. That by the contract of marriage in 1761, Francis Fraser secundus had merely a right of liferent, or, at all events, had no power to restrict the fee thereby bestowed on his son Lieutenant

Fraser, as the heir-male of the marriage, to a mere liferent right; and it was not competent for Lieutenant Fraser to consent to such restriction, so as to affect the interest of Mr. Fraser, who was then his creditor; and,

3. That as the lease was an onerous and rational deed, and was granted with the consent of the other two interdictors, and as Mr. Fraser was a party to it, it was not objectionable.

The Court, on the report of the Lord Ordinary, sustained the pursuer's title, and decerned in terms of the libel.

Lord Gillies.—The question is, whether this be a good security? Prior to the date of the tack, the whole lands were already let. It is very plain, therefore, that it was impossible to let them at the same time to Fraser. The leases themselves might have been assigned; but this was not done. There is, no doubt, a power to uplift the rents, but there is no assignation to them. Besides, Francis Fraser (secundus) was fiar, and entitled to dispose of the lands as he thought fit. He conveyed them to his son Lieutenant Fraser in liferent, who consented to that restriction, so that he was a mere liferenter. It is true he had a power to grant tacks, but then he has not granted a valid and effectual tack. As to the question of the title of the pursuer, there appeared at first some doubt; but she is the only accepting tutor, and as such is entitled to pursue on behalf of her son.

Lord Balgray.—The lease is further objectionable, as being granted in favour of an interdicted party. In the late case of Kyle, (Dec. 14. 1826, ante, Vol. V. No. 82,) where the same question arose, the deed was sanctioned by a special quorum of the interdictors, and it was clearly shown that it was an onerous and rational deed, which is not the case here.

The other Judges concurred.

Defender's Authorities.—1. Ersk. 7. 58; 1672, c. 2; 1. Ersk. 7. 23.

J. M'Cook, W. S.—J. R. Skinner, W. S.—Agents.

A. MILLAR, Complainer.—*Sol.-Gen. Hope—Menzies.*
J. GIBSON-CRAIG and Others, Respondents.—*D. of F. Moncreiff—Ivory.*

No. 175.

Process—Burgh Royal.—Pending the discussion of a defence of no process stated to a petition and complaint against the election of Magistrates of a royal burgh, a councillor, not being an original party to the complaint, allowed to sist himself, to the effect of maintaining that the complaint had been effectually before the Court within the two months.

Feb. 6. 1827.

2D DIVISION. Lord Newton. B.

ON the petition and complaint against the election of the Magistrates of Culross, mentioned ante, Vol. V. No. 40, having gone to the Lord Ordinary to be prepared, in terms of the late Act of Sederunt, a motion was made to have one Shed, a member of council, sisted as a complainer along with Millar. This was opposed on the part of the respondents, on the ground, that as the objection of no process, founded on the allegation of Millar having withdrawn the complaint before service was ordered, had been reserved by the judgment of the Court, it was necessary to determine whether there was a process or not, before allowing any new party to be sisted, it being impossible for a party to sist himself, unless there were actually a process in Court. On the other hand it was contended, that every person having an interest to complain of the election of Magistrates was entitled to sist himself as a party, to the effect of maintaining that there had been a complaint properly presented within the two months, whereby a jus quæsitum had arisen in favour of all parties entitled to insist in such a complaint, if once effectually presented to the Court. The Lord Ordinary allowed Shed 'to sist himself as a party to the complaint,' and appointed parties to debate on the dilatory defence of no process which had been given in by the respondents. To this interlocutor the Court adhered, in respect it was still competent for the respondents to insist that there was no process at the time of Shed's sisting himself as a party.

LORD JUSTICE-CLERK.—During the discussion of the preliminary defence, any councillor has a clear interest and title to sist himself, and maintain that there is a process. Even if Millar himself wished to withdraw, and to admit that there was no process, still any councillor might sist himself, and contend that a complaint had been duly presented within the two months, which he, or any one having interest, was entitled to carry on.

LORD PITMILLY.—If the meaning of the Lord Ordinary's interlocutor was to find that there was a process, and that Shed was entitled to sist himself as a party to it, I would be for altering; but that is not

the meaning of the interlocutor, which merely amounts to this, that Shed is entitled to appear and debate whether there be a process to which he may afterwards sist himself, and I think that he is entitled to do so.

Lord Alloway.—I entertain doubts of this interlocutor, as it at present stands. If there be no process, Shed certainly has no right to *sist* himself; but this interlocutor allows him to *sist* himself, and it might therefore happen that the process may be thrown out as to Millar, and yet Shed be entitled to go on with it. If this, however, were properly guarded against, I would go along with the rest of the Court.

Their Lordships accordingly inserted the qualification above mentioned.

Horne and Rose, W. S.—Gibson-Craigs and Wardlaw, W. S.—Agents.

No. 176. W. Fair, Suspender.
Sir S. Stirling, Charger.—*Rutherfurd.*

Feb. 6. 1827.
2d Division.
Lord Mackenzie.
F.

Landlord and Tenant.—A tenant having been charged for payment of the half year's rent of the penult year of his lease, brought a suspension, on the ground that referees, to whom certain claims between him and his landlord had been submitted, had given an interim award in his favour (though not an effectual one) for a larger sum than the rent due.

The Lord Ordinary suspended the letters hoc statu, and the Court adhered.

Molle, Turnbull, and Brown, W. S.—A. Pearson, W. S.—Agents.

No. 177. J. M'Cartney and Others, Advocators.—*D. of F. Moncreiff—Marshall.*
C. Crosbie, Respondent.—*Skene—Whigham.*

Feb. 6. 1827.
2d Division.
Lord Mackenzie.
M'K.

In an action at the instance of M'Cartney &c. against Crosbie, the Steward of Kirkcudbright assoilzied the latter. In an advocation the Lord Ordinary remitted simpliciter, and the Court adhered.

W. Dalrymple,—J. Hannay, W. S.—Agents.

HARROWAR'S TRUSTEES, Pursuers and Advocators.—*More.* No. 178.
Sir J. D. ERSKINE, Defender and Respondent.—*Jeffrey—Rutherfurd.*

Servitude—Clause.—Under a reserved right to coal, with the privilege of transporting &c., and doing every thing necessary thereanent, the party in right of the coal is not entitled to take materials out of the lands for the purpose of forming the roads required for the transportation of the coal.

Feb. 6. 1827.
2D DIVISION. Lord Mackenzie. M'K.

IN 1747 Mr. John Erskine of Carnock disponed to one Taylor his lands of Inzievar, 'reserving always to the said Mr. John 'Erskine, his heirs and successors, the property of the whole coal 'within the reserved lands, and liberty and privilege to work, 'win, and transport the same, and for that effect to set down 'sinks, make aqueducts, and to do every other thing necessary 'thereanent,—he and his foresaids always satisfying and paying 'the said James Taylor and his foresaids the damage done to 'the surface of the lands thereby.' This reserved right was afterwards conveyed to the ancestor of the defender, while part of the lands of Inzievar passed into the hands of the late Mr. Harrowar.

In 1816 Sir James Erskine (the defender's father,) having occasion to make a new road from one of the coal-works, began to quarry stones for the purpose of forming it out of a quarry in the lands of Inzievar. As this was a privilege which had never before been exercised, Mr. Harrowar's trustees applied to the Sheriff of Fife for an interdict. This having been refused, they brought an advocation, and at the same time raised an action of declarator, to have it found that Sir James and his tenants had no right 'to take any of the stones, wood, or other parts and per-'tinents of the said lands &c. for the purpose or under the pre-'tence of assisting them in forming roads of approach to or from 'the said coal, or of aiding them in any other way in working, 'winning, or transporting the said coals.' Against this it was pleaded in defence by Sir James, That his author, who was proprietor of the lands and coal, having, on disponing the former, reserved right to do every thing necessary for transporting the coal, he was entitled under that reservation to take materials out of the lands to make the roads which were necessary for transporting the coal, he always paying the surface damage, as provided by the reservation in his author's favour.

The Lord Ordinary found, 'that the reservation under which 'Sir James Erskine claims does not give him right to take ma-'terials for making roads out of the lands of the late Mr. Har-'rowar, not occupied by the said roads;' and his Lordship ac-

cordingly decerned in the ordinary action, and in the advocation advocated the cause, and interdicted in terms of the application to the Sheriff.

The Court, on advising a reclaiming note for Sir John Drummond Erskine, who had now succeeded his father Sir James, unanimously adhered.

The LORD ORDINARY observed in a note:—Besides the terms of the reservation, which seems limited to a right of passing over, or of making a road or roads on the property, not necessarily implying the right of taking materials for road-making there, one thing has weight with the Lord Ordinary, viz. that the only damage for which the coalmaster is to pay is *surface damages*, and therefore it is not presumable that it was understood he had right to do other damage by exhausting stone-quarries, lime-quarries, gravel-pits, clay or sand, &c. for which he was not to pay. Could he build a bridge, for instance, or make a canal, or erect an engine-house, or collier's-house, by working out a lime-work, or sand-pit, freestone-quarry, or clay-pit on the lands, paying nothing for stones, bricks, or mortar? This seems too much. There seems no limit but that applicable to rights of road mentioned in the interlocutor.

Their Lordships unanimously concurred, observing that the absolute right of the whole property, except the coal, had been conveyed away by Mr. John Erskine, the original proprietor, and that the reservation, so far as regarded the transportation of the coal, amounted to nothing more than a right of passage over the lands.

W. DICKSON, W. S.—CAMPBELL and MACK, W. S.—Agents.

No. 179.

J. DUNLOP, Advocator.—*Skene.*

J. CHRISTIE, (HARLEY'S Trustee,) Respondent.—*Jameson—Penney.*

Feb. 8. 1827.

1ST DIVISION. Lord Eldin. D.

THIS was a question as to whether certain cows, which were in the possession of William Harley of Glasgow at the time of the sequestration of his estates, belonged to him or to Dunlop, who alleged that he had placed them in Harley's cow-house on trial with a view to a sale, but that they had not been actually sold. The Sheriff of Lanarkshire, after allowing a proof, found that Dunlop had failed in establishing his property; but in an advocation the Lord Ordinary altered, and the Court adhered.

MACK and WOTHERSPOON, W. S.—J. A. CAMPBELL, W. S.—Agents.

Mrs. ALLETTA DE WITT, Pursuer.—*Skene—Gillies.* No. 180.
J. YOUNG and Others, Defenders.—*Napier.*

THIS was a special case relative to a servitude of road, in which the Lord Ordinary deemed in terms of the libel, and the Court adhered.

Feb. 8. 1827.
1ST DIVISION.
Lord Eldin.
D.

W. SPALDING,—G. LOGAN, W. S.—Agents.

A. KAY, Pursuer.—*Bruce.* No. 181.
Mrs. RONALDSON and Others, Defenders.

Process.—THE defenders having failed to lodge revised answers and note of pleas within the period limited, the Lord Ordinary allowed them to be received on payment of the previous expenses, which were afterwards taxed at £23. They then presented a note to be reponed without payment of expenses; but the Court adhered, except as to those of the summons and defences.

Feb. 8. 1827.
1ST DIVISION.
Lord Eldin.
H.

J. JOHNSTON,—CAMPBELL and PATTISON,—Agents.

TRUSTEES of R. V. AGNEW, Raisers.—*A. Wood.* No. 182.
A. MACNEEL and Others, Claimants.—*Baird.*

Process—Multiplepoinding.—The Lord Ordinary having ordained the raisers of a multiplepoinding to consign a certain sum, but having omitted to add the word 'decerns,' whereby the order could not be enforced; and it having become final, and a change of circumstances having taken place—Held not competent to amend the order by adding that word, and that the raisers were entitled to lodge a new condescendence of the fund in medio.

MACNEEL and others, who had been purchasers from the late Robert Vans Agnew of parts of the Sheuchan estates which had been evicted from them, brought a process of multiplepoinding in name of his trustees, in which the Lord Ordinary, on the 25th of May 1826, pronounced this interlocutor:—'In the mean 'time ordains the trustees, raisers of the multiplepoinding, within 'ten days, to consign in the British Linen Company Bank the 'sum of £4082 of admitted balance in their hands; and if said 'sum shall not be so consigned, allows an interim decreet to go 'out and be extracted, to the effect of compelling consignation in 'the manner above mentioned; and if extract shall be necessary, 'finds the trustees liable in the expense of extract.' The trustees consigned £2500; but being unable, in consequence of the in-

Feb. 8. 1827.
1ST DIVISION.
Lord Eldin.
D.

solvency of their agent, to consign the balance, Macneel and others attempted to extract the above interlocutor. As it had not the word 'decerns,' they found that this could not be done; and they then enrolled the case, when their counsel 'represented, 'that consignation having been made to the extent only of '£2500, the claimants found that they could not obtain an ex-'tract, in order to make the consignation effectual as to the ba-'lance, by reason that the interlocutor happened to be written 'out, per incuriam, without the technical expression 'decerns.' 'He therefore moved his Lordship to supply that defect, and to 'allow an extracted decree to go out in the name of the said 'Alexander Macneel and others, claimants, for compelling con-'signation of the aforesaid admitted balance in the hands of the 'trustees, deduction therefrom being allowed of the £2500 con-'signed by them in part, as above mentioned.' On the other hand, the counsel for the raisers 'objected to any addition being 'now made to the said interlocutor, and craved leave to give in 'an amended condescendence.' The Lord Ordinary having accordingly allowed them to give in an amended condescendence, Macneel and others reclaimed, and contended that his Lordship ought to have issued an interim decree in terms of his interlocutor of the 25th of May, to the effect of correcting it by adding the word 'decerns.' In answer to this, the trustees maintained, that as the interlocutor was final, it was no longer competent to touch it; and that as there had been in the mean while a material alteration of circumstances as to the amount in their hands, they ought to be allowed to give in a new condescendence. The Court adhered.

WALKER, RICHARDSON, and MELVILLE, W. S.—DONALDSON and RAMSAY, W. S.—Agents.

No. 183.

JAMES LINDSAY, Pursuer.—*Cuninghame.*
PETER LINDSAY and MANDATORY, Defenders.—*Clephane—Brownlee.*

Mandatory.—Held that the mandatory of a defender residing abroad is liable for expenses.

Feb. 8. 1827.
1st DIVISION.
Lord Eldin.
H.

THE only general point in this case was, whether the mandatory of a defender residing abroad is liable in expenses? The Lord Ordinary decerned against both parties, and the Court refused to allow the question to be argued, holding it to be settled; but, on the merits, limited the decree for expenses.

J. GREIG,—R. WILSON,—Agents.

J. WRIGHT and G. ANDERSON, Suspenders.—*Keay.* No. 184.
D. O'HENLY, Charger.—*Buchanan.*

Messenger—Reparation.—Held that the cautioners of a messenger, who has been guilty of negligence in executing a summons, cannot be subjected in payment of the debt, until it has been constituted against the debtor.

Feb. 8. 1827.
1ST DIVISION.
Lord Alloway.
H.

O'HENLY, a merchant in Loch Boisdale in the island of South Uist, having sold goods to James Urquhart, the master of the brig Hero, (of which M'Killigan and Robertson, merchants in Banff, were owners,) on behalf of the vessel and crew, and Urquhart having drawn a bill on the owners, which they refused to accept, O'Henly raised an action against the whole parties for payment before the Court of Admiralty. On the 22d of December 1820, his agents transmitted the Admiralty precept to Alexander Thomson, messenger in Banff, instructing him to execute it against the defenders; and on the 30th Thomson wrote to them, stating that he had done so against M'Killigan and Robertson, but that he had not found Urquhart, who he understood was in King's Bench prison, and that he would bring the precept with him to Edinburgh on Wednesday then first. In consequence of being erroneously addressed, the letter from Thomson did not reach O'Henly's agents till the 11th of January 1821; and on the 29th they wrote to him, expressing their surprise that he had not transmitted the precept, and intimating that they would hold him and his cautioners liable; which notification they renewed on the 15th of February, and told him he need not now send them the precept. This precept, as usual in those of the Admiralty Court, contained a warrant of arrestment.

In the mean while M'Killigan and Robertson put up protestation against O'Henly for not insisting in the action, which they obtained and extracted. O'Henly then raised an action in the Court of Session against Thomson, and Wright and Anderson, his cautioners, for the debt of £30 and the expenses incurred, being £6. 17s.; and having obtained a decree in absence for these sums, and £11: 5: 2 of expenses of process, and £1: 17: 8 as due of extract, he gave them a charge, of which Wright and Anderson brought a suspension.

In defence they maintained, That although they admitted their liability for the expenses, yet that decree could not pass against them for the debt until it had been constituted against M'Killigan and Robertson, who were perfectly solvent; that in all the cases which had hitherto arisen as to the liability of cautioners for a messenger, the debt had been constituted, and the negli-

gence occurred in the execution of diligence; but that it did not follow, because a party had raised a summons, that his claim was well founded; and if it were not well founded, he could not lawfully insist for payment, either from the messenger or his cautioners; and that although there was a warrant to arrest in the precept, yet this was merely in security in the event of obtaining decree, and could not establish that in fact any debt was due.

On the other hand, O'Henly contended, That he was entitled to absolute relief from the cautioners, to whom he was willing to assign his claims; that it was not incumbent on him to take any further steps in the matter; and that as he had been prevented from executing his arrestment,—and as the debt was constituted against Urquhart,—and as it had been settled that the measure of loss was the amount of the debt, he was entitled to payment, reserving to the cautioners their recourse against M'Killigan and Robertson, and against Urquhart.

The Lord Ordinary repelled the reasons of suspension, and, on advising a representation, adhered, 'in respect that the Admiralty precept was sent to the messenger to be executed qua messenger solely, and he either did not execute the same, or at all events did not return it, on which arrestments might have been instantly used; and in respect that the respondent from the first offered to assign to the representers the whole of his original debt against all the parties concerned.'

Against this interlocutor the cautioners reclaimed; and, on advising their petition with answers, the Court, on the 12th December 1822, 'superseded consideration of this petition until the debt be constituted, when they will advise the same with the answers and whole cause.' Thereafter O'Henly having obtained decree of constitution against M'Killigan and Robertson, who paid the debt, the question came to be, what was the amount of expenses for which the cautioners were liable? The Court found the letters orderly proceeded against the cautioners 'for the sum of £6. 17s., with interest thereon, and for the sum of £11: 5: 2 of expenses of process, and for £1: 17: 8, the dues of extract, all as stated in the decree charged on;' but found no further expenses due.

At the first advising of the case,

Lord Balgray observed:—The interlocutor is right. The summons contains a warrant of arrestment, by virtue of which the debt might have been recovered; and O'Henly is therefore entitled to say that he would have recovered it. Here the diligence is engrafted on the summons, and it is impossible to maintain any distinction between this case and those which have formerly occurred.

LORD GILLIES.—It is true, if a messenger neglect to execute diligence, and the party be insolvent, that the messenger and the cautioners must pay the full debt. In these cases the debt is constituted; but here the debt is not only not constituted, but is disputed. It is true that it is constituted so far as regards Urquhart, (as to whom no neglect can be alleged in executing the summons); but it is not so against M'Killigan and Robertson, who are not alleged to be insolvent. The question is not, whether any damage has been sustained, but whether there is any debt; for, if there be no debt, no damage can be qualified.

LORD PRESIDENT.—I am of the same opinion. If the debt shall hereafter be constituted, and O'Henly is unable to recover from the proper parties, he may do so from the cautioners of the messenger.

LORD SUCCOTH.—Although the debt is liquid quoad Urquhart, yet it is not so as to M'Killigan and Robertson. No neglect can be alleged as to the execution of the summons against Urquhart, because he was not in Banff, but in King's Bench prison. The neglect, therefore, which can alone be founded on, relates to the transmission of the precept, so as to proceed against M'Killigan and Robertson; and no doubt, if the debt had been constituted against them, O'Henly would have been entitled to recover. But they deny the debt, and therefore we cannot proceed further till decree of constitution be obtained.

At the second advising,

LORD CRAIGIE stated, that he considered it a nice question, and that O'Henly was entitled to be fully indemnified.

LORD GILLIES observed, that there was a material distinction between the execution of a summons and the execution of diligence; and asked whether, if a summons of declarator had been brought by a party of his right to the Roxburghe estate, the messenger and his cautioners would be liable to implement the conclusions of it by loosing the summons?

The LORD PRESIDENT concurred in this distinction, and remarked, that if the bill had been accepted by M'Killigan and Robertson, it would not have been necessary to obtain a decree of constitution; but as that was requisite, the cautioners could not be liable in the expenses of obtaining that decree.

Suspenders' Authorities.—M'Millan, March 2. 1820, (F. C.); 1 Bell, 293.
Charger's Authorities.—1. Bell, 413; Chatto, Jan. 17. 1811, (F. C.); Dengan, July 3. 1817, (F. C.)

MACMILLAN and GRANT, W. S.—H. MACQUEEN, W. S.—Agents.

No. 185. R. JACKSON, Suspender.—*Sol.-Gen. Hope—Christison.*
MRS. E. JACKSON, Charger.—*D. of F. Moncreiff—Ivory.*

Juratory Caution.—Juratory caution in a bill of suspension not received without production of title-deeds of suspender's heritable property, which were in possession of his agent, subject to a right of hypothec.

Feb. 8. 1827.
2D DIVISION.
Bill-Chamber.
Lord Eldin.
B.

A bill of suspension of a charge on a bill of exchange was passed on juratory caution; but the bond not having been lodged, a certificate of refusal was taken out. A second bill was presented, which the Lord Ordinary refused. The suspender then reclaimed, and still offered juratory caution. To this it was objected, that in the interim he had granted an heritable bond to his agents over a house, which constituted his whole property. With a view to obviate this objection, the parties holding the bond gave in a minute, agreeing to waive their preferable claim under it in favour of the charger; but the Court holding this to be insufficient, as it would not be available in a question with their assignees or creditors, refused the reclaiming note. A third bill was then presented, accompanied with a renunciation of the bond; but the agents, holders of the bond, having refused to deliver up the title-deeds, which they held, subject to a hypothec for their business-account, the Lord Ordinary refused the bill, and the Court adhered.

LORD JUSTICE-CLERK.—We agreed to pass the former bill on juratory caution; but there must be a fair bonâ fide juratory caution given. What is here offered is not so. To make it worth any thing, the title-deeds must be produced; and unless the hypothec be renounced, and the titles lodged, we must refuse the bill.

LORDS PITMILLY and ALLOWAY concurred.

RITCHIE and MILLER,—W. MURRAY, W. S.—Agents.

No. 186. A. CAMPBELL, Pursuer.—*Sol.-Gen. Hope—M'Neill.*
C. CAMPBELL, Defender.—*Jameson—A. Murray jun.*

Feb. 8. 1827.
2D DIVISION.
Lord Mackenzie.
B.

Expenses.—The Court adhered to an interlocutor of the Lord Ordinary, finding the defender liable in expenses, subject to modification.

BOWIE and CAMPBELL, W. S.—CUNINGHAM and BELL, W. S.—Agents.

CUNINGHAM and BELL, W. S., Pursuers.—*L'Amy.*
Mrs. M'KIRDY, Defender.—*Cuninghame—Shaw.*

No. 187.

Passive Title—Vitious Intromission.—A widow who had been decerned executrix qua relict, but had intromitted with her husband's effects &c. without confirmation or making up inventories, subjected to the passive title of vitious intromission.

Feb. 8. 1827.

2D DIVISION. Lord Mackenzie. M'K.

THE late Mr. M'Kirdy, writer in Greenock, was, at the period of his death, indebted to Messrs. Cuningham and Bell, writers to the signet, the sum of £297, being the amount of certain accounts of law business performed by them on his employment for behoof of various clients. M'Kirdy died suddenly, leaving the defender, his widow, with a family of six children. The widow continued the possession of the furniture and other moveables &c. of her deceased husband, and at the request of several of his creditors, she obtained herself decerned executrix qua relict; but she never gave up any inventory, or obtained confirmation. Under this title she raised actions against several debtors to her deceased husband, in one of which, against persons called Niven, she obtained decree, under the qualification that she should confirm before extract. It was also alleged by the pursuers that she had recovered several of the debts due, and in particular one of £250. This last-mentioned debt she admitted to have recovered, but she alleged that she had applied it in payment of £180 of the pursuers' claim, and of certain preferable debts, which more than exhausted the remainder.

For payment of the balance of their accounts Cuningham and Bell raised the present action against the widow and children, as having incurred a representation to the deceased by the passive title of vitious intromission. In defence it was pleaded, That under all the circumstances of the case, the widow having obtained a title as executrix qua relict, and having intromitted, so far as she did intromit at all, at the request and for behoof of her husband's creditors, and obviously without any view of appropriating any part of the funds to herself, she ought not to be subjected in an universal representation, merely from neglect to make up inventories, and obtain herself confirmed; and that the decree craved against her should be restricted to one cognitionis causâ.

The Lord Ordinary found, 'that it is not denied that the defender had a general intromission with the effects of her deceased husband as executrix qua relict; while it is not averred

'that she ever was confirmed, or made out any inventory;' and decerned against her accordingly, but assoilzied the children.

To this interlocutor the Court adhered.

LORD ALLOWAY.—With every desire not to carry a very severe doctrine into effect, I do not see how we can avoid finding the defender liable, especially when we see, in the action against Niven, the decree not allowed to be extracted till confirmation obtained, thus putting her completely on her guard. It is the hardest case I ever saw, but it is impossible to alter the interlocutor.

LORD PITMILLY.—I can see no reason for interfering with this interlocutor. The only plea arises from the circumstance of great hardship, which, however, we cannot consider in a question of law. No doubt, the severity of our law as to the passive title of vitious intromission is much relaxed from what it was formerly; but we may apply here a remark made in the case of Gardner, that the doctrine of vitious intromission may be blotted out of our books if the defender is not liable. She has intromitted generally and recovered debts without confirmation, and we have only a vague statement that nothing wrong was intended, &c. We must not, however, yield to such considerations; and unless this woman be held to have incurred the passive title of vitious intromission, I must hold that doctrine to be entirely at an end.

LORD JUSTICE-CLERK.—I have felt with all your Lordships a desire to relieve this woman; but, in deciding a pure question of law, we must not give way to our feelings, and in point of law I can see no ground for altering. The case of Gardner was of a very special nature, and the Court were far from unanimous; while, on the other hand, the case of Lord Belhaven and several others were decided on circumstances not nearly so strong as those which occur in the present.

Defender's Authorities.—3. Ersk. 9. 53; Scott, Dec. 5. 1623, (9824); Stark, Jan. 22. 1713, (9830); Gemmell, July 9. 1724, (9830); Wilson, June 19. 1772, (9833); Tawse, July 10. 1783, (9837); Gardner, Dec. 9. 1802, (9840); Gray, Feb. 27. 1662, (9857); Baird, June 15. 1681, (9856); Brown, July 6. 1664, (9857); Bell, March 1686, (9860); Renton, Dec. 12. 1738, (9860.)

CUNINGHAM and BELL, W. S.—A. P. HENDERSON,—Agents.

S. GRANT, Pursuer.—*Cuninghame—Hopkirk.*
Captain J. M'DONALD and D. GRANT, Defenders.—*Sol.-Gen. Hope—Handyside.*

No. 188.

Cautioner—Landlord and Tenant.—Held,—1.—That an improbative cautionary missive for a tenant is rendered binding by the tenant being put into possession on the faith of it;—2.—That a landlord does not lose his recourse against cautioners by neglecting to enforce his right of hypothec;—and,—3.—That cautioners for a tenant 'for the first three years rent of a subset,' are not freed in consequence of no written lease for a definite period of longer endurance having been granted.

Feb. 8. 1827.

2D DIVISION. Lord Medwyn. B.

IN October 1819, the defenders addressed to the pursuer, who was principal tacksman of a small farm called Lentilich, a letter in these terms:—'We the undersigned engage to be accountable 'to you for the first three years rent of a subset from you to 'Allan M'Donald, say £45 for the three years.' This person, Allan M'Donald, was put into possession at the Martinmas following, but he received no written sublease from the pursuer. He paid the first year's rent; but having fallen the second year into arrear, he deserted the farm in February 1822, leaving the ground unsown and unlaboured. On this the pursuer raised an action before the Sheriff of Elginshire against the defenders, on their cautionary missive, for payment of the rent for the year 1821, and also for the current year.

In defence against this action it was pleaded,

1. That the cautionary missive was improbative as to the defender Duncan Grant.

2. That it had reference to the first three years of a subset to be granted, obviously meaning a subset for a longer period than three years, but that no such subset had been granted.

3. That the pursuer had lost recourse by not having enforced his right of hypothec; and,

4. That he had allowed a brother of Allan M'Donald to possess along with him, who had paid part of the first year's rent, and had thus been recognised by the landlord as joint tenant.

To this it was answered,

1. That a rei interventus had followed on the missive, by Allan M'Donald having been allowed to enter into possession on the faith of it.

2. That there was no provision as to a sublease being granted for any definite period, and that the term of the tenant's possession had been shorter than three years, in consequence of his failure to pay the rent, and subsequent desertion.

3. That a landlord was not bound to enforce his hypothec dur-

ing the currency of a lease, in order to preserve recourse against cautioners, and that nothing had been left on the farm at the period of the tenant's desertion; and,

4. That the tenant's brother had merely resided in the house with him; and besides, that his having paid rent as tenant, if it had been so, was to the advantage of the cautioners, and not to their prejudice.

The Sheriff having assoilzied the defenders, the pursuer raised an action of reduction of the decree of absolvitor, concluding also to have the defenders found liable in payment of the rent sued for in the original process. In this action the Lord Ordinary found, 'that there is sufficient rei interventus to obviate any objection on the part of the defender Duncan Grant that the said letter is not probative quoad him, and that a landlord does not lose his right of recourse against a cautioner for his tenant by neglecting or delaying to enforce his right of hypothec, as was found in the case of M'Queen *v.* Fraser, June 11. 1811;' and reduced and decerned accordingly. The Court unanimously adhered.

Their Lordships were unanimously of opinion that the case of M'Queen had settled the only point of importance in the case, and that the judgment in that case was well founded, on the principle that it was the duty of cautioners for a tenant to see that the rent was duly paid, and that the landlord was not obliged to injure the farm, and expose the tenant to the risk of ruin, by exercising his right of hypothec whenever he fell into arrear. In regard to the plea founded on no lease for any period of years longer than three having been granted, their Lordships thought, that had a lease for any definite period been stipulated, it would have altered the case very much; but that, as it stood, it afforded no ground for relieving the cautioners.

R. MACKENZIE, W. S.—A. DUFF, W. S.—Agents.

No. 189.

J. WILSON, Suspender.—*Jameson—Shaw.*
J. and J. MITCHELL, Chargers.—*Maitland.*

Summary Diligence—Bill of Exchange—Forgery.—A party having been charged as payee and indorser of a promissory note, but not being designed on the face of it, and his designation having been without authority inserted in the diligence, and he denying that he was a party to the note, and it appearing, comparatione literarum, that the indorsation was not his signature, the letters were suspended simpliciter.

Feb. 9. 1827.
1ST DIVISION.
Lord Eldin.
S.

JAMES WILSON, farmer at Shields, was charged at the instance of Mitchells, as the indorser of a promissory note drawn by John Wilson senior, which was in these terms:—'£105: 14: 7 ster-

'ling.—Glasgow, 6th June 1825.—Three months after date, I 'promise to pay to James Wilson, or order, at my shop, £105. '14s. 7d. sterling, value received. John Wilson senior. (Indorsed) 'James Wilson.'

Of this charge James Wilson brought a suspension, in support of which he stated, that the drawer, John Wilson senior, had been guilty of forgery to the extent of upwards of £20,000, and had been obliged to fly from the country; that the mode in which he usually committed these forgeries was by drawing promissory notes, payable (as in the present case) at his own shop, in favour of a payee whom he did not design, and whose name he put on the back as indorser; and that when these notes became due, they were brought to his shop and retired by him by means of the proceeds of similar forged bills; so that in this way he had succeeded for a long time in escaping detection. The suspender denied that he was a party to the note charged on, or that the signature on the back of it was written by him; and stated, that although there was nothing on the face of the note to point him out as the James Wilson whose name was on the back of it, yet either the notary or the writer to the signet had, without any authority, fixed it upon him by inserting his designation, 'farmer in Shields,' in the diligence.

He therefore maintained,

1. That if the name 'James Wilson' indorsed on the note was intended to represent his signature, it was a forgery; that, however, it might be the genuine signature of some other James Wilson; but it was shown, by comparing it with his genuine signatures, that it was not subscribed by him, and that if the chargers alleged that it was his signature, they were bound to prove their allegation; and,

2. That the charge was unwarrantable, seeing that the notary or writer to the signet who inserted the designation in the diligence had no authority for doing so; and that as he denied that he was a party to the note, it was incumbent on the chargers, if they alleged that he was so, to constitute the debt against him by an ordinary action, and not to proceed by summary diligence.

To this it was answered,

1. That the suspender was brother-in-law to John Wilson senior, and was in the practice of accommodating him, and giving currency to his bills; that the chargers had received the one in question from John Wilson senior on the faith that it was indorsed by the suspender, and they accordingly averred that his signature was genuine; and that at all events, as he had given currency to similar bills, he was liable in payment of it; and,

2. That the diligence was warranted by the invariable practice in all cases of drawers or indorsers of bills, none of whom was ever designed on the face of the bill.

The Lord Ordinary, after having compared the signature on the note with those which were genuine of the suspender, and 'having considered the paper or writing charged upon, said to 'be a promissory note granted by John Wilson senior in favour 'of the suspender, and indorsed by him to the charger, for the 'sum of £105: 14: 7, dated 6th June 1825, and payable three 'months after date, found that the said paper or writing is not 'a true note or bill received or indorsed by the suspender, and 'due and payable by him, but a paper not obligatory upon him;' and therefore suspended the letters simpliciter, and found expenses due.

The chargers then reclaimed, and contended that the case ought to be remitted to the Jury Court, to try the question of forgery; but the Court adhered to the Lord Ordinary's interlocutor, with this explanation,—'In so far alter the ratio decidendi 'of the interlocutor reclaimed against, as to find that the name of 'the said James Wilson being inserted without any further de-'signation, whether in the body of the note, or added to the sub-'scription, the paper or writing cannot be held ex facie a true 'note, unless otherwise proved to be such.'

Lord Craigie.—In this case the suspender denies that he was a party to the bill, and it appears, on comparing the name indorsed with his genuine signatures, that his allegation is true. If he had been designed on the face of the bill, there might have been some difficulty in refusing a remit to the Jury Court; but he is not so; and it is only by the act of the charger, or those employed by him, that the diligence has been directed against this suspender. I apprehend, therefore, that in these circumstances, which take this out of the ordinary case, we cannot allow the diligence to proceed.

Lord Gillies.—I am of the same opinion. The notary or clerk to the signet employed by the chargers has thought fit to assume that the suspender was the James Wilson whose signature appears on the back of the bill; but it is manifest, on comparing his genuine signatures with that on the bill, that they have gone against the wrong party. There are many other James Wilsons in Glasgow, and I can see no authority for fixing on the suspender. There is no more common name than that of John Smith, and I have no doubt that in London there are ten thousand bills in circulation with that name upon it; but would it be competent, on the mere surmise of the holders or their agents, to proceed in a summary manner against the extensive banker of that name, notwithstanding his denial that he was the

party, and that this was manifest on inspection? I apprehend not; and therefore, as it is plain that the name on the note in question is not the signature of the suspender, the letters must be suspended.

Lords President and Balgray concurred.

Chargers' Authorities.—1. Bell, 302; 3. Esp. 60; 4. Esp. 226; 1. Marsh. 159.

C. Fisher,—W. Guthrie,—Agents.

A. Muir and Others, Pursuers.—*Cullen.*
D. Munro, Defender.—*J. W. Dickson.*

No. 190.

Process—6. *Geo. IV. c.* 120.—A pursuer having failed to lodge answers to a condescendence, the defender assoilzied with full expenses, although the latter had been previously subjected in the greater part of the expenses of process.

Muir and others brought an action before the Admiralty Court against Munro for payment of £33: 14: 6, in which judgment was pronounced against him with expenses, in respect of his refusal to confess or deny certain facts, and of declining to undergo a judicial examination. Of this he brought an advocation; and the Lord Ordinary having appointed mutual condescendences, Muir and others reclaimed, and contended, that before being allowed to condescend, Munro was bound to pay the previous expenses, and the Court pronounced judgment accordingly, and remitted quoad ultra. Thereafter Muir and others having failed to answer the condescendence for Munro, the Lord Ordinary assoilzied him from the action, and found him entitled to the whole expenses, both in the Court of Admiralty and the Court of Session.

Against this interlocutor Muir and others reclaimed; but not having produced their answers along with the reclaiming note, in terms of the statute, the Court adhered.

Feb. 9. 1827.
1st Division.
Lord Meadowbank.
H.

Ormiston and Allan,—D. Clyne,—Agents.

John Brown, Pursuer.—*A. Murray.*
James Turner, Defender.—*Wilson.*

No. 191.

Process—College of Justice—50. *Geo. III, c.* 112.—Held incompetent for a party claiming right as a member of the College of Justice to raise an action for a sum under £25, as indorsee of an open account due to a party not having any privilege, and to whose trustee he was to be accountable.

John Brown, writer in Edinburgh, raised an action against Turner in the Court of Session as indorsee of an open account of £13. 14s. alleged to be due by Turner to one Brown, a boot and shoe maker, and whose estate had been sequestrated. In defence

Feb. 9. 1827.
1st Division.
Lord Meadowbank.
H.

Turner pleaded, That as the pursuer did not allege that he was a member of the College of Justice, and at all events, as he did not hold the debt as in his own right, having stated in a letter demanding payment, that he had been 'required to account for 'your debt to the trustee on Mr. Brown's estate,' and as it was less than £25, the action was incompetent. To this it was answered, That the debt was indorsed to the pursuer, without limitation, in payment of a debt due to him, whereby he had full right to it; and as he was a member of the College of Justice, the action was perfectly competent.

The Lord Ordinary repelled the defence, 'in respect there is 'no evidence in process to instruct that the pursuer does not hold 'the account libelled in his own right.' But the Court, after stopping the counsel for the defender, and calling on the counsel for the pursuer, altered, and dismissed the action.

The Judges were of opinion, that as it appeared from the pursuer's own letter that he was liable to account to the trustee of the bankrupt, this was evidence that he did not hold the debt on his own account, in which respect this case was distinguishable from that of M'Intosh against Brodie, June 17. 1826, (ante, Vol. IV. No. 439.)

J. Brown,—D. Wilson,—Agents.

No. 192. John Morrison and Spouse, Pursuers.—*D. of F. Moncreiff—Cuninghame.*

M. Miller and Others, (Morrison's Trustees.)—*Cockburn—Keay—Shaw.*

Trustee—Reparation.—Circumstances under which it was held that testamentary trustees, who were required by the testator to invest the residue of his funds in heritable property or bank security, and who, acting under the advice of counsel, had declined, on the requisition of all concerned, to invest the residue in Government stock, and brought a process of multiplepoinding and exoneration, in the course of which the fund was paid to those having right, were liable in the loss thereby sustained.

Feb. 9. 1827.
1st Division.
Lord Eldin.
D.

The late William Morrison, the son of the pursuers, having realized in India a fortune of upwards of £20,000, returned to this country, and, having gone to England on a visit, was suddenly taken ill, where he made his will in an informal manner. By that deed he bequeathed 'to my father John Morrison, farmer 'in Campsie, and to my mother Cecilia Lennox, jointly, the 'whole of my property whatever which I may die possessed of, 'after paying all my lawful debts, burdened with the following 'payments.' He then bequeathed legacies to each of his six sis-

ters, and to certain other persons, and stated that 'it is further 'my will, that on the decease of my last surviving parent, as 'named above, what remains of the money I have bequeathed 'above to them shall be divided in equal shares amongst my sur-'viving sisters, and the surviving children of such of them as may 'have died before theirs, and my parents.' He also provided, 'that if any of my heirs or legatees above mentioned should dis-'pute or go to law with the others respecting the sums above be-'queathed to them, they shall forfeit all benefit of this my last 'will and testament,' &c.; and he thereby appointed 'William 'Fairley, merchant in London, of the house of Fairley, Bonham, 'and Company, Mr. Michael Miller, merchant in Glasgow, Mr. 'William Carrick, merchant in Glasgow, the Reverend William 'Hamilton, minister of the gospel at Strathblane, and Mr. James 'Allan, merchant in Glasgow, to be my executors and trustees 'of this my last will, and desire them to invest in heritable pro-'perty or bank securities the nett proceeds of my estate, after 'paying the above legacies, for the benefit of the residuary lega-'tees, my parents.'

Mr. Morrison died within a few days after executing this will; and the pursuers and their daughters, together with the other parties interested in the will, then entered into a deed of agreement, in which, after narrating the terms of it, and 'that 'after the said will and testament was executed, several matters 'occurred to the deceased which had been omitted to be inserted 'therein, and which he verbally desired should be considered as 'forming part thereof, owing to which and to other circumstances, 'particularly to the circumstance of the said will having been 'written in a hurried manner, it is necessary that the executors 'should have more full authority than what is contained in said 'will, to enable them to carry the intentions of the deceased fully 'into effect for behoof of all concerned;' therefore they bound and obliged themselves 'to ratify, as we do hereby fully ratify 'and confirm, the foresaid last will and testament of the said de-'ceased William Morrison in the whole head articles, clauses, 'tenor, and contents thereof, and hereby engage, agree, and bind 'ourselves and our foresaids never to quarrel or impugn the 'same, or any part thereof, in any manner whatsoever, but to 'give every assistance in our power towards carrying the same 'into complete effect;' and they then authorized 'the saids Wil-'liam Fairley, William Carrick, Michael Miller, the Reverend 'William Hamilton, and James Allan, and the acceptors or ac-'ceptor, survivors or survivor,' to proceed to the execution of the office committed to them, by paying off the debts and lega-

cies, 'and to invest the balance, after deducting these and the 'other sums hereafter mentioned, and all other sums and expenses 'to be legally and necessarily laid out by them, in the manner 'directed by said will and testament;' and, with consent of the accepting trustees, they appointed Mr. Carrick to be factor, subject to the direction of the trustees, and authorized him to make payment to them of the residue, or invest the same in the manner directed by the will.

Messrs. Miller and Carrick, as the accepting and surviving trustees or executors, proceeded to realize the estate, part of which they invested in heritable security, and the remainder, being about £10,000, they deposited in the Glasgow Bank, on a receipt payable to Mr. Carrick as factor. A question having then arisen between the trustees and the pursuers as to whether they were merely liferenters, or entitled to payment of the residue, the pursuers consulted two different counsel, one of whom gave an opinion that the nature of their right was extremely doubtful, and the other, that although, according to the law of Scotland, they were the fiars or residuary legatees, yet as the will had been executed in England, it might probably receive a different interpretation there. These opinions having been shown to the trustees, they consulted counsel upon this point, and also as to the mode of disposing of the residue. The answer which they received was, that 'as to the right of the parents, the words of the will are 'not very clear upon this point; but, on the whole, I am of opi-'nion that the parents are not limited to a liferent, but are the 'residuary legatees, and after payment of the special debts, lega-'cies, &c. are entitled to the absolute property of what shall re-'main:'—'That as the parents are, in my opinion, to be the ab-'solute proprietors of the residue, they may do afterwards with 'it as they please; but, in the first instance, I conceive that the 'memorialists are bound by the express words of the will to lay 'out the money in heritable property or bank security, and that 'neither the parents nor anybody else can prevent this.' They were also advised to raise a process of multiplepoinding and exoneration, in order that the question of right might be determined, and a judicial discharge obtained.

On the 2d of May 1821, a few days after receiving this opinion, the trustees received a letter from a gentleman acting on behalf of the pursuers, requiring them 'to vest the money now in the Glas-'gow Bank in Government stock, one half in three per cent. con-'sols, and one half in three per cent. reduced.' Immediately on receiving this letter, the trustees, on the 4th of May, wrote to the pursuers, that 'they have come to the determination of being

'guided by a Court of law in the future administration of the 'estate, according to the recommendation of an eminent counsel, 'and mean to proceed with an action before the Court of Session, 'calling the whole parties into the field, in order to ascertain their 'several interests, and fix the disposal of the funds;' and in this resolution they stated that they had been confirmed by the above requisition, which appeared to them to be at variance with the will. On the 16th of the same month, the pursuers and the other parties interested in the will wrote to the trustees the following letter:—'Gentlemen,—We have received yours of the 4th May, 'and be pleased to attend to our answer.

'We have an interest in the funds in your hands No other 'person has any; in particular, you have none whatever. You 'seem to think that when the balance in your hands lies in a 'bank upon a deposit receipt, and subject to the order of your 'factor, this is a bank security in terms of the will. We think 'it is no security at all; and we do repeat the desire expressed 'in Mr. M'Farlane's letter of the 2d May, delivered to you that 'day, that this balance shall be forthwith vested in Government 'stock, one half 3 per cent. reduced, one half 3 per cent. consols.

'We further give you notice, that when we come to settle with 'you, we shall hold you liable for the highest selling prices be- 'tween the 15th May, when the money ought to have been so 'invested, and the future terms of settlement,—for all the divi- 'dends falling due between these two dates,—and for all hazard 'that the money runs in its present precarious state. This, re- 'member, will be your debt to us due by you, conjunctly and se- 'verally.

'You express doubts as to the right of the fee of the funds in 'your hands. Upon what ground this opinion of yours rests, 'after the opinions of counsel which you have seen, we cannot 'tell. But if the counsel was wrong, and you right, it can do 'no harm to vest the money in Government stock. We are,' &c.

On the 21st the trustees again took the advice of counsel, and received this answer:—'There is no ground whatever on which 'the memorialists can be required to lay out the money in the 'public funds, or in which their non-compliance with the demand 'of those who hold themselves out as the only parties interested, 'can entitle these persons to threaten them with the penal con- 'sequences mentioned in the letter. I think, therefore, that they 'should just leave the money in the bank, where it has all along 'been placed,—that they should proceed with their process of 'multiplepoinding, and that they ought to combine with this a 'conclusion for exoneration.'

In consequence of this opinion, (which, together with the memorial, the trustees communicated to the agents of the pursuers,) they wrote to the latter, declining to invest the money in Government stock, and that they meant to be regulated by the orders of the Court of Session. Accordingly, on the 12th of June, they raised a summons of multiplepoinding and exoneration, which was executed on the 23d; and the pursuers, on the 2d of July, brought a summons of count and reckoning, on the dependence of which they arrested the funds in the Glasgow Bank.

The Lord Ordinary having found that the pursuers were the residuary legatees, preferred them to the fund in medio, which was paid to them on the 9th of August 1822; but repelled various objections which were made to the administration of the trustees, and found them entitled to expenses.

The pursuers then brought an action of damages, in which, founding on the will—the relative deed of agreement—the requisition to invest the money in the Government stock—the letter of 16th May—the refusal of the trustees to do so—and the loss which they had sustained in consequence of the rise of stocks between the date of the requisition in May 1821, and the payment of the money in August 1822, they concluded that the trustees should be ordained 'to make payment to the pursuers of the sum of '£3000 sterling, or of such other sum as shall be ascertained to 'be the loss and damage sustained by them through the refusal 'on the part of the defenders to vest the funds in Government se-'curities, as they were required to do by the pursuers, and by 'every person who had, or ever could have, any interest in them.'

In defence against this action the trustees contended,

1. That as they were bound to dispose of the money in the precise mode pointed out in the will, and as they were expressly ordered by the testator 'to invest in heritable property or bank 'securities the nett proceeds of the estate, after paying the above 'legacies, for the benefit of the residuary legatees, my parents,' which they had done, and as there was no authority to purchase Government stock, which was a security of a fluctuating and speculative nature, they would have been acting contrary to the will, if they had complied with the requisition of the pursuers.

2. That the pursuers were barred personali exceptione from demanding damages on account of not investing the funds in Government stock, because they had bound themselves by the deed of agreement to confirm the will of the testator in all respects; and, besides, they had arrested the funds, and so tied up the hands of the trustees.

3. That supposing they ought to have invested the money

in Government stock, still, as they were gratuitous trustees, acting bonâ fide, and under the advice of counsel, they could not be made liable in damages for a mere error in judgment; and,

4. That if any liability attached to them, it could only be on the footing of not having paid the money to the pursuers; that as they had not bound themselves, and had not undertaken to invest the money in Government stock, they were just in the situation of debtors refusing payment, and therefore could not be liable for more than the lawful interest on the sum in their hands.

To this it was answered,

1. That by the terms of the will the pursuers were the absolute proprietors of the whole free fund, and of this the trustees had been made aware by the opinions of counsel, so that they could not pretend ignorance; and at all events, as every person interested had subscribed the letter of the 16th of May, they were not entitled to withhold payment of the money; and,

2. That as they had acted illegally in so doing, they must be liable for the actual loss and damage which the pursuers had thereby sustained.

The Lord Ordinary found, 'that the facts and averments established and admitted are relevant to infer damages against the 'defenders;—that the defenders are liable to the pursuers in the 'loss and damage sustained by them through the refusal on the 'part of the defenders to vest the funds in the Government securities, as they were required to do;' and remitted to an accountant 'to inquire into, and report to the Lord Ordinary upon the 'actual loss and damage that have arisen to the pursuers from 'the difference between the prices of the Government funds at the 'two periods condescended on by them.'

The trustees having reclaimed, the Court adhered.

Lord President.—This is not the case of a mere error in judgment. There was a breach of instructions. All parties interested gave notice that the money was required for the special purpose of investing it in the stocks. The words of the will appear to me perfectly clear, and to bestow upon the pursuers an undoubted right to the residue. It was to be at their entire disposal, and it was only in the event of their not making use of it during their lives that it was to go to their children. It has been said that there can be no other damage for non-payment of money except interest. That may be true where the person stands in the situation of a proper debtor; but if I have money in the hands, for example, of Sir William Forbes and Company, and I order them to invest it in Government stock, which they fail to do, have I no claim beyond the mere interest of the money? I apprehend that I am entitled to be indemnified for the loss which I may thereby sustain. It is also said that the money,

by being placed in the Glasgow Bank in name of the factor, was secured in terms of the will. That, however, was not the nature of the security contemplated by the testator.

LORD BALGRAY.—This is a perfectly clear case. In general, the Court do not subject trustees in damages where they merely commit an error in judgment; but here the trustees must have seen, both from the terms of the will and the opinions of counsel, that the fee was in the pursuers, so that it was impossible they could have been in good faith in refusing payment of the money. But if they had had any doubt, it must have been removed by the letter of the 16th of May; and the question comes to be, whether they had a right to resist the demand there made? I apprehend that they had not. They were told that the money was wanted to be invested in the public funds, and they refused to give it up, alleging that it was placed on a bank security in terms of the will, when it was lying deposited in bank in the name of the factor. But that was not the security mentioned in the will. The case, however, turns entirely on the refusal to obey the requisition made by all concerned, and in that view I think the interlocutor well founded.

LORDS CRAIGIE and GILLIES concurred.

TOD and WRIGHT, W. S.—A. P. HENDERSON,—Agents.

No. 193. Mrs. and Miss RENNY, Advocators.—*Jameson.*
J. BALDERSTON, Respondent.—*Baird.*

Feb. 9. 1827.
2D DIVISION.
Ld. Cringletie.
M'K.

Expenses.—The Lord Ordinary, while he advocated and assoilzied in an advocation at the instance of Mrs. and Miss Renny, found no expenses due but those of the answers to a representation. The Court adhered.

J. BALFOUR, W. S.—W. WADDELL, W. S.—Agents.

No. 194. WILLIAM MURE, Esq. Pursuer.—*Cockburn.*
GEORGE RAILTON, Defender.—*Greenshields.*

Process—Jury Court.—Held not imperative to remit to the Jury Court an action of damages for breach of contract, and against which there were defences stated in point of law.

Feb. 10. 1827.
1ST DIVISION.
Lord Eldin.
H.

ON the 18th of May 1825, Mr. Mure of Caldwell let to the defender, for one year, the inn at Lugton Bridge, on the road between Glasgow and Irvine; and in the missive of lease there was, inter alia, the following stipulation:—'The tenant hereby binds 'and obliges himself to keep a clean commodious house for the 'benefit of the public of all ranks and descriptions, and not less 'than one chaise and good post-horses for the ready conveyance 'of persons posting either with their own carriages, or requiring 'the use of a post-chaise or chaises, and also to furnish the house 'properly with all the necessary additional articles of furniture 'it may require,' &c.

Railton took possession, and continued for one year; and, after his removal, Mr. Mure brought an action, in which he alleged 'that the said George Railton, defender, failed to implement the 'whole conditions and stipulations come under by him in terms 'of the said missives;—in particular, he did not at all times keep 'even one chaise and good post-horses for the ready conveyance 'of persons posting either with their own carriages, or requiring 'the use of a post-chaise or chaises; during a considerable time 'there were no post-horses at all, and on several occasions tra-'vellers were obliged to leave the inn on foot, or wait until they 'could procure horses from Beith or elsewhere;—that, by the 'said George Railton's thus failing to provide the means of con-'veyance, the resort of travellers to the said inn, and along the 'said road, was seriously diminished, because travellers, being 'aware of there being no mode of conveyance to carry them for-'ward, took other roads, though more circuitous, where they 'could be accommodated with posting;—that the said defender 'has thus committed a breach of the agreement betwixt him and 'the pursuer, constituted by the said missives, to the manifest 'injury and damage of the pursuer.' He therefore concluded, that the defender should be ordained 'to make payment to the 'pursuer of the sum of £250 sterling, or such other sum as our 'said Lords shall determine to be the loss and damage sustained 'by the pursuer, in consequence of the foresaid breach of agree-'ment by the defender.'

In defence against this action, the defender pleaded,

1. That as the missive was not stamped, and was improbative, it was ineffectual.

2. That as Mr. Mure resided in the immediate neighbourhood, and never objected, during the currency of the lease, to the want of carriages and horses, he was barred personali exceptione from bringing an action of damages on that ground; and,

3. That the allegations in the summons were not well founded.

The pursuer having moved that the case should be forthwith remitted to the Jury Court, the defender objected that it was not imperative to do so; that this was an action, not for a delict or quasi delict, but for a mere breach of contract; and that it was in the discretion of the Court either to send this case to the Jury Court or not.

To this it was answered, That the summons concluded simply for damages, and arose out of a breach of contract, which was of the nature of a quasi delict; and it was therefore imperative to remit the case to the Jury Court.

'The Lord Ordinary having heard parties' procurators upon

'the motion made by the pursuer to remit this case to the Jury 'Court,' appointed him to lodge a condescendence in terms of the statute, and the Court adhered.

LORD PRESIDENT.—It is in the discretion of the Court either to send this case to the Jury Court or not; but there are pleas in law in this case, which, whether well founded or not, ought to be decided in the first place, and, if sustained, may supersede the necessity of such a remit.

LORD BALGRAY.—One of the defences is, that the document libelled on is not stamped, and the effect of that must be decided before going to the Jury Court.

LORD CRAIGIE.—This is not a case which must of necessity be sent at this stage to the Jury Court. If it were so, every action arising between a landlord and tenant would require to be instantly sent there; but that is not the case.

LORD GILLIES.—Unless there be pleas in law which it is proper first to dispose of, and if it appear that a case must ultimately go to the Jury Court, the sooner it is sent there, the better.

J. G. HOPKIRK, W. S.—N. W. ROBERTSON,—Agents.

No. 195. JAMES TAIT and Others, Pursuers.—*Jeffrey—Rutherfurd.*
EARL of LAUDERDALE, Defender.—*D. of F. Moncreiff—Gibson-Craig.*

Title to Pursue.—An action of reduction of a decree of the Justices of the Peace, ordering a road to be shut up, and of declarator of right to it having been brought, among others, by several parties, describing themselves as servants—Held that unless they were householders they had no title to pursue.

Feb. 10. 1827.
1ST DIVISION.
Lord Newton.
S.

THE Earl of Lauderdale obtained a decree of the Justices of Peace and Commissioners of Supply for the county of Berwick, authorizing him to shut up a road or footpath passing through his lands near to Thirlstane Castle, and approving of another line of road which he undertook to make in place of the former one. Thereafter a summons of reduction of the decree, and of declarator to have it found that the original road was a public parish road, and ought not to be shut up, was brought against his Lordship at the instance of nineteen parties, of whom ten described themselves as being 'servants' in Lauder and its neighbourhood,—two of them as being herds,—and the others as tenants residing in the vicinity, or as being merchants in Lauder.

Against this action his Lordship pleaded these preliminary defences,

1. That the pursuers' agent had produced no authority for carry-

ing on this action at the instance of the different parties named as pursuers, and that several of the pursuers utterly disclaim it.

2. That almost all the parties named as the pursuers are servants, who may be in one parish one half of the year, and in a different part of the country during a different part of the year; and none of the pursuers have either right or title to insist in the present action; and,

3. That all the pursuers are barred from pursuing the action, first, by having acquiesced in the decree for shutting up the road, and in the expensive operations which the defender, in terms of the decreet, carried into execution; and, secondly, if any of the defenders are burgesses, they are farther barred by their representative, the chief magistrate, having approved of and confirmed the decree.

The Lord Ordinary 'repelled the first and second of these de-'fences, and, with regard to the third defence, that the pursuers 'are barred from pursuing the action, for the reasons there stated, 'reserved the consideration thereof till the peremptory defences 'shall be pleaded, and the cause heard upon the merits.'

Lord Lauderdale then reclaimed, and contended chiefly that the pursuers who were described as servants had no title or interest to insist in the action; that they had no fixed settlement; and that accordingly, since the action had been raised, several of them had left that part of the country; so that it was plain that their names had been merely inserted in the summons to give the appearance of a party, as none of the respectable members of the community would consent to appear.

To this it was answered, That the public in general, and particularly those who resided in the neighbourhood, had both an interest and a title to resist the shutting up of any public road; that there was no disqualification of servants from maintaining such a right; that the road which it was proposed to substitute in place of the one in question was longer and more circuitous than it; and that a servant, both in the exercise of his lawful occupation as a servant, and in reference to his own private concerns, either in going to kirk or market, had a substantial interest and title to insist that the shorter and more convenient road should be kept open; but that, in point of fact, many of them were cottagers and farm-servants or labourers.

The Court found, 'that such of the pursuers, designed ser-'vants, as are householders, have a title to insist in this action; and, 'with this explanation, refuse the prayer of the note, and adhere 'to the Lord Ordinary's interlocutor reclaimed against.'

Lord Balgray.—The question here is, Whether the parties who appear are entitled to pursue this reduction? The first defence is not well founded, because no disclamations have been produced; and the presumption is, that an advocate who appears for a party is duly authorized to do so. With regard to the second defence, I do not think it is well founded as to those who are tenants and residenters; but I doubt extremely whether a mere servant is entitled to insist in such an action. If his master has agreed, or does not object, to the alteration on the road, what right or title has he to resist it, and put himself in opposition to his master? The last defence may be well founded, but it is not yet ripe for decision.

Lord Craigie.—This road is alleged to be a public kirk and market road, and I apprehend that any member of the community, who can show a sufficient interest, is entitled to resist any alteration.

Lord Gillies.—I agree in that general proposition; but I do not consider that persons who are merely servants have either such an interest or title as to give them a right to set aside this decree.

Lord President.—If they be merely servants, hired from term to term, and living in family, I apprehend that they have no title; but if, on the other hand, they be cottagers, who hire themselves out as farm-servants or labourers, I think that they have a title.

G. Scott,—Gibson-Craigs and Wardlaw, W. S.—Agents.

No. 196.

C. Ferrier, (Lyell's Trustee,) Pursuer.—*Miller.*
Dr. Young, Defender.—*Skene.*

Process—Proof.—Held not competent to insist for production of private plans belonging to one of the parties in a cause in modum probationis.

Feb. 10. 1827.
1st Division.
Lord Eldin.
H.

Ferrier, as trustee for the creditors of George Lyell of Kinneff, having brought an action of declarator of property against Dr. Young, and a condescendence having been ordered, the defender moved the Lord Ordinary to grant him a diligence for recovery of certain judicial plans, and also of certain private plans in the hands of the pursuer or his constituent relative to the subject-matter of dispute, in order to enable him to support his defences. This was resisted by the pursuer, so far as regarded the private plans, which he contended were private property, and at all events were not that species of evidence which could have any effect on the decision of the cause, as they had been made up merely as a sketch or vidimus for temporary purposes.

The Lord Ordinary 'granted diligence at the defender's instance, as craved, for recovery of the judicial plans of the estate 'of Kinneff, but refused the application quoad the private

'plans called for, belonging to the pursuer;' and the Court adhered.

Scott and Booe, W. S.—J. Arnott, W. S.—Agents.

C. Tait, Pursuer.—*Matheson—Tait.*
J. Mackenzie, Defender.—*Sol.-Gen. Hope—Ivory.*

No. 197.

Expenses.—This was a special case, relative to a claim of expenses by the pursuer. The Lord Ordinary refused them, and the Court adhered.

Feb. 10. 1827.
1st Division.
Lord Eldin.
S.

C. Tait, W. S.—R. Mackenzie, W. S.—Agents.

Janet Dollar, Suspender.—*A. M'Neill.*
J. Murdoch, Charger.—*Penney.*

No. 198.

Legal Diligence—Husband and Wife.—A charge having been given to a married woman on a bill accepted by her, and the charger having judicially abandoned the charge against her, and passed from it by a marking on the letters of horning, a bill of suspension refused.

Janet Dollar and her husband having granted a bill to Murdoch, on which he charged them, they presented a bill of suspension, in which she contended, That as she was a married woman, the bill was not obligatory upon her; and her husband having made a reference to the oath of the charger, he deponed negative. In the answers to the bill the charger abandoned the diligence as against Dollar, and the Lord Ordinary then refused the bill. She reclaimed, and contended, That as the Bill-Chamber was not a Court of record, she had no protection against the further execution of the diligence; but the charger having exhibited the letters of horning with a marking on the back, abandoning the charge against her, the Court adhered.

Feb. 10. 1827.
1st Division.
Bill-Chamber.
Lord Balgray.
H.

J. Nairne,—D. Smith,—Agents.

No. 199. J. WATT, Pursuer.—*Jeffrey.*
R. M'INTOSH, Defender.—*Skene—Maidment.*

Process—Execution.—Objection to an execution repelled, that it did not contain the designations of the parties, or mention the date of the summons, it being written on a blank sheet originally stitched to the summons, and bearing reference to the foregoing summons.

Feb. 10. 1827.
2D DIVISION.
Lord Newton.
B.

IN an action at the instance of Watt, it was pleaded by the defender M'Intosh, as a preliminary defence, That the execution of citation, which was written on a separate sheet of paper from the summons, but stitched to the end of it under the original cover, did not contain any designation of either the pursuer or defender, and did not specify the date or signeting of the summons to which it was meant to apply. To this it was answered, That where the leaf or sheet on which the execution was written was one of the blank leaves attached to the summons, it was quite sufficient if it referred to the foregoing summons, it being the universal practice to write executions on the blank sheet at the end of the summons, and in this form.

The Lord Ordinary repelled the defence, and the Court unanimously adhered.

CAMPBELL and MACK, W. S.—J. JAMESON,—Agents.

No. 200. Miss JANE JEFFREYS and Mandatory, Petitioners.—*W. Bell.*

Records—Deed, Preservation of.—Court remitted to the Depute Clerk Register to take steps for restoring a mutilated deed.

Feb. 10. 1827.
2D DIVISION.
F.

THIS was an application by Miss Jeffreys, setting forth that a deed of settlement, executed by her deceased uncle in 1809, had been very much mutilated, and become in many parts nearly illegible, from having been deposited in a damp place, and praying for a remit to the Keeper of the Records of the Court of Session, or other skilled persons, to take such steps as might be practicable for adjusting and putting together the mutilated parts, and rendering the deed legible.

The Court remitted to the Depute Clerk Register (whom they considered the proper person to intrust with matters of this kind) 'to take such measures, and employ such persons, as may seem 'to him most fit for putting together the torn or mutilated parts 'of the deed;' and the Depute Register subsequently reported to the Court, that the whole of the deed had been restored and rendered legible, with the exception of part of one of the witnesses' names, and the word 'witness' attached thereto.

RENTON and GRANT, W. S. Agents.

E. BLACKETT and Others, Pursuers.—*More.* No. 201.
W. BERRY and R. FORSTER, Defenders.—*Baird—Jameson.*

Expenses.—THE Lord Ordinary found the defenders entitled to certain expenses in the course of preparing the cause. The Court recalled his Lordship's interlocutor, and reserved the question of expenses.

Feb. 10. 1827.
2D DIVISION.
Lord Cringletie.
B.

HORNE and ROSE, W. S.—TOD and HILL, W. S.—Agents.

A. M'CARTNEY, Manager of Commercial Bank, Pursuer.—*More.* No. 202.
M. M'KENZIE, Defender.—*Robertson.*

Process.—Diligence to recover writs.

THIS was an objection to the opening a sealed packet of excerpts of correspondence, as not falling within the terms of the diligence for recovery of all correspondence mentioned in a condescendence, which was not very clearly expressed as to this point. The Lord Ordinary had found that the defender was not entitled, hoc statu, to see this correspondence; but as no objection had been taken to the call for these productions when first made before the commissioner, nor till after some procedure by the commissioner in taking the excerpts, and after an interlocutor of the Lord Ordinary had become final, authorizing the haver to proceed with taking the excerpts as begun by the commissioner, the Court appointed the seals to be opened, reserving all objections to the production of particular letters.

Feb. 10. 1827.
2D DIVISION.
Lord Cringletie.
M'K.

J. A. CAMPBELL, W. S.—H. MACQUEEN, W. S.—Agents.

W. CAMPBELL, Pursuer.—*Sol.-Gen. Hope—Tait.* No. 203.
R. BAIRD, Defender.—*D. of F. Moncreiff—Shaw.*

Master and Servant—Partnership.—A written contract of service, not stamped nor tested, having been entered into by a minor with a party trading under the firm of a company in which there had been originally several partners, but of which he was now the sole partner, held that the contract was binding.

IN the year 1796 a company was formed under the firm of Hugh and Robert Baird, as engineers, in the neighbourhood of Glasgow, consisting of several partners, and in particular of two of the above names. Between that period and the 12th of January 1811, all the partners, with the exception of Robert Baird, gradually retired, and of which notice was given in the Gazette.

Feb. 13. 1827.
1ST DIVISION.
Lord Medwyn.
H.

From that period Robert Baird continued to carry on business under the original firm till 1822, when it was alleged that he assumed his son John Robert Baird a partner;—but as this allegation was disputed, it was not taken into consideration in the ultimate decision of the case.

On the 7th of April 1824 the father of the pursuer addressed a letter to the foreman of H. and R. Baird, requesting employment for his son, and on the 10th of the same month the following agreement was entered into:—

'Gentlemen,—I hereby agree and bind myself to serve Messrs. 'Hugh and Robert Baird, iron-founders and engineers, or those 'appointed by them, faithfully and diligently as a loam-moulder, 'and the whole affairs connected therewith, or relating thereto, 'and that for and during the space of two years from this date, 'which is the period of my agreement; and during which agree-'ment I shall not absent myself, desert, or amuse myself during 'the ordinary hours of labour, (sickness excepted,) without leave 'asked and obtained from Messrs. Hugh and Robert Baird; and 'for each absent day, or part of a day, without leave so obtained, 'I shall forfeit two shillings and sixpence, or, in the option of my 'masters, serve two days, at the expiration of this agreement, for 'each day, or part of a day, I so absent myself. Further, I shall 'not embezzle, waste, or destroy any of the goods or materials of 'my masters, or reveal or make known any of their secrets, or 'be accessory to idleness or mischief done in the shop, under a 'penalty of five shillings for each offence.

'P. S.—Agreeably to this agreement, both parties bind them-'selves, viz. John R. Baird for H. and R. Baird on the one 'part, and William Campbell, son of George Campbell, at pre-'sent manager of the Glasgow Foundery, on the other part; it 'being understood and agreed upon that H. and R. Baird pay 'William Campbell twenty-two shillings weekly in name of wages, 'being the wages fixed upon.'

This contract was signed before witnesses, and the pursuer entered to his service, and continued to work for several months, when he deserted, alleging that he had been maltreated. A petition was then presented to the Justices of Lanarkshire by H. and R. Baird, praying to have him ordained to return to his service, and to find caution to implement his agreement, under the pain of imprisonment. After a proof, and a reference to the oath of Mr. Baird, the Justices decerned in terms of the prayer of the petition against Campbell, who immediately, and before the decree was extracted, brought an action of reduction of it, and also of the above agreement. An objection having been taken to the com-

petency of a reduction of a decree which had not been extracted, the Court, on the report of Lord Meadowbank, superseded that point till the issue of the reduction of the agreement, and remitted to Lord Medwyn to proceed accordingly, (see ante, Vol. IV. No. 201.)

In relation to the validity of that agreement, several pleas were maintained by the pursuer, but he rested chiefly on the ground,

1. That as all the partners of the company of H. and R. Baird had retired with the exception of the defender Robert Baird, the company was thereby dissolved; that it was not lawful for him thereafter to carry on business as if the company were still in existence; and that the agreement having been made, not with him as an individual, but with the company of H. and R. Baird, which in point of fact had no existence, it was null and void.

2. That as the agreement was neither tested nor stamped in terms of the statutes, it was ineffectual; and,

3. That as he was a minor when he entered into it, and it did not bear to be with consent of his father, it was not binding upon him.

On the other hand, it was maintained by the defender,

1. That nothing was more common than for merchants and traders to continue to carry on business under firms, although the original partners were either all or many of them dead or retired; that these firms obtained a good will, which was of itself extremely valuable, and there was no rule of law by which the survivors or remaining partners were bound to abandon them; that although it might be improper for a single individual to commence business under the firm of a company, and this might be argued to infer a fraud against the public, yet this was entirely different from the case where a bonâ fide company had been originally established, and the majority of the partners had gradually retired and made over their shares, either to one or more of the remaining partners; that no fraud was alleged to have been committed in inducing the pursuer to contract with the defender under the original firm, nor did he allege any injury; and that if his plea were available, it must have the effect to annul every contract entered into with parties trading under firms which did not represent the real partners in the concern, but which was a doctrine never hitherto recognised; and,

2. That as the agreement was not an indenture made with an apprentice, but an ordinary contract of service, and as the pursuer was by profession a loam-moulder, and had homologated the transaction, his pleas as to its being improbative, and being in minority, were unfounded.

The Lord Ordinary having reported the question upon Cases,

the Court unanimously assoilzied the defender, and found him entitled to the expenses both of this and of the former discussion.

The Judges were unanimously of opinion, that as it was not alleged that any fraud or deception had been practised on the pursuer, his first plea was entirely unfounded; that there were numerous companies in existence trading under a firm originally assumed, where none of the partners were alive; and that there were many others which carried on business under a general designation, such as the Carron Company, where the partners are daily fluctuating, but it had never been supposed that the contracts made by them were on that account null and void; and Lord Gillies remarked, that on this point he could not discover even a ratio dubitandi. Their Lordships were also of opinion, that as this was a mere contract of service, it did not require to be stamped or tested, and that the plea of minority was inapplicable to such a case.

Pursuer's Authorities.—(1.)—Marshall, Jan. 20. 1815, (F. C.); 2. Bell, 641; Douglas, Heron, and Co. June 16. 1792; 2. Bell, 646; Nairn, Nov. 25. 1795; 2. Bell, 626.—(2.)—1681, c. 5.—(3.)—1. Ersk. 7. 33; Hume, June 28. 1671, (5688.)

Defender's Authorities.—(2.)—Rymer, July 19. 1781, (5726); 55. Geo. III. c. 184. Exemp. voce Agreement; 1. Ersk. 7. 38; Heddle, June 5. 1810, (F. C.)

D. SCALES,—A. P. HENDERSON,—Agents.

No. 204. J. SMITH, Advocator.—*D. of F. Moncreiff—Whigham.*
P. MILLER, Respondent.—*Thomson—Cuninghame.*

Triennial Prescription.—Held that the triennial prescription does not apply to the price of a bullock alleged to have been purchased for family consumption.

Feb. 13. 1827.
1ST DIVISION.
Lord Eldin.
H.

THE only general point involved in this case was, whether the triennial prescription applied to the purchase of a bullock which was bought in order to be slaughtered for the use of the respondent's family? The Sheriff of Dumfries-shire repelled the defence; but, on advising a reference to oath, he pronounced judgment on the merits against Smith, (the original pursuer,) who brought an advocation, in which the Lord Ordinary repelled the defences, and decerned in terms of the libel. Miller having reclaimed, the Court, while they were perfectly clear that the defence of prescription was unfounded, and declined to listen to any answer to it, altered on the merits, and remitted simpliciter.

E. HOGGAN, W. S.—R. RUTHERFORD, W. S.—Agents.

Mrs. MACKENZIE and H. MUNRO, Pursuers.—*D. of F. Moncreiff —Buchanan.* No. 205.

MAGISTRATES of DINGWALL and Others, Defenders.—*Jeffrey —Menzies.*

Process—6. *Geo. IV. c.* 120.—Held competent for the Lord Ordinary, after the time for lodging a revised condescendence has been prorogated, to order the former papers to be withdrawn, and a new condescendence to be given in, and to allow additional time for doing so, with a view to putting the case in proper shape.

Feb. 13. 1827.

1ST DIVISION.

THE pursuers brought an action relative to a right of fishing against the Magistrates of Dingwall, and also against Mrs. Munro and others, in which the Lord Ordinary, prior to the Judicature Act, appointed the pursuers to lodge a special condescendence, and the defenders to see and answer. On the 28th of January 1826 his Lordship renewed the order, and appointed the condescendence to be lodged, in terms of the Judicature Act, within 14 days, and the answers to be given in within 14 days thereafter. Again, on the 18th of February, he appointed answers to be lodged at the second box-day of the then ensuing vacation; and on the 8th of July he appointed the parties to revise their condescendence and answers, and to lodge their papers, with notes of pleas, by the second box-day in the autumn vacation, and the first sederunt-day in November. These papers were accordingly lodged; but on the 20th of November his Lordship 'appointed 'parties' procurators to reconsider the papers, and within three 'weeks to lodge the revised condescendence, and relative note of 'pleas in law, and on or before the box-day in the Christmas re-'cess, to lodge the revised answers and relative note of pleas in 'law.' On the 16th of December he 'prorogated the time for lodg-'ing the revised condescendence and relative note of pleas in law 'till the third sederunt-day in January next, and till three weeks 'thereafter to lodge the revised answers, and relative note of pleas 'in law.' When the time was just expiring, the pursuers enrolled the case on the 18th of January 1827, and 'represented to the 'Lord Ordinary that it would be of great advantage to the par-'ties, if the pursuers were permitted to state their case against 'the Magistrates of Dingwall in a separate condescendence, and 'also to give in a separate condescendence against the other de-'fenders, and moved the Lord Ordinary to grant permission for 'such separation.' His Lordship accordingly 'allowed them to 'do so, and to disjoin and separate the condescendences formerly 'ordered,' and appointed them to be lodged within ten days.

Against this order the Magistrates of Dingwall and the other

defenders reclaimed, and contended, That as it was in truth a second prorogation of the time for lodging the condescendence, it was incompetent under the 12th section of the Judicature Act.

To this it was answered, That it was not a prorogation, but was an order for putting the case in a new and correct shape, which it was competent for the Lord Ordinary to do at any time before the record was actually closed.

The Court refused the reclaiming note.

LORD PRESIDENT.—The order is not incompetent. Till the last moment of closing the record, the Lord Ordinary may put the case into such shape as he thinks most proper for the preparation of the cause. Suppose that papers have been lodged, revised, and have been laid before the Lord Ordinary, if he think these papers irregular, or that the cause has not been properly prepared, is it not competent for him to order the papers to be withdrawn, and appoint new ones to be lodged? Whether he is right or wrong in doing so, is another question; for the point before us is, whether he has the power to do so? and I apprehend that he has so. Indeed, in preparing a cause we must trust very much to the Lord Ordinary. It is not correct to say that the order which has been issued here is a prorogation; it is to the effect of making a new case, and to prevent a confusion of parties.

The other Judges concurred.

H. MACQUEEN, W. S.—HORNE and ROSE, W. S.—Agents.

No. 206.

P. SMITH and Others, Pursuers.—*Murray—Jameson.*
R. AITKEN and Others, Defenders.—*Jeffrey—Menzies.*

Sale.—The seller of an heritable property is bound to make up a valid title at his own expense, unless the purchaser has explicitly consented to take the title as it stands in the person of the seller.

Feb. 13. 1827.

2D DIVISION. Lord Mackenzie. B.

THE pursuers had a few years ago purchased a property from Aitken, (whose trustees the defenders were,) by a contract of sale, binding Aitken 'to grant in favour of the said 'Peter Smith, and his foresaids, a disposition or other deed or 'deeds necessary for vesting the full right of the said sub-'jects now standing in the person of the said William Aitken 'in favour of the said Peter Smith;' and they now insisted in an action concluding to have the sale annulled, in consequence of the seller being unable, as they alleged, to furnish a complete title. It was reported, however, by Mr Richard M'Kenzie, writer to the signet, on a remit from the Lord Ordinary, that although Aitken had no effective feudal title to the property in his person,

yet he had vested in him such a right as would enable him to make up an effective feudal title, but that this would be attended with very considerable expense; and the question then arose, Whether the purchasers, by the terms of the missive, and by their conduct appearing from the correspondence, and as admitted by them on a reference to oath, had agreed to take the title to the property as it stood in Aitken's person, so as to throw upon them the expense of making up a complete title?

The Lord Ordinary being of opinion that they had agreed to this, appointed them, before further answer as to the sufficiency of the title, to say whether they were willing to pay for the expense of a title made up as recommended by Mr. M'Kenzie.

Against this interlocutor the purchasers reclaimed; and the Court holding that there was nothing in their conduct which implied a waiver of the obligation lying on the seller by law to convey to them a complete title, found that the defenders must give a valid title at their own expense, and so far varied the interlocutor of the Lord Ordinary.

Their Lordships were agreed on the general principle, that a seller was bound to give a complete feudal title, unless the purchaser had specifically agreed to take the right as it stood in the seller's person; and it was stated that in Dick *v.* Donald, lately reversed by the House of Lords, this Court had not proceeded on any principle contrary to that doctrine, but on the ground that the title there offered was a good title; and in regard to the present case, that the purchasers had not waived their right; and that even if the stipulation in the contract were construed to mean that the seller was to convey merely the right as it stood in his person, he must be held to have warranted that right to be a 'full right' as there set forth.

W. and A. G. Ellis, W. S.—R. S. Wilson, W. S.—Agents.

Mrs. Heatlie or Logan, Petitioner.—*Sol.-Gen. Hope—A. M'Neill.* No. 207.

W. Cathcart and Others, Respondents.—*Jeffrey—Fullerton.*

Parent and Child.—Held that a mother whose husband was dead, and had who married again, was entitled to access to her minor daughter by her first marriage in the custody of her curator; but that, in the peculiar circumstances of the case, this could only be allowed in presence of a third party.

Feb. 14. 1827.

1st Division. D.

The petitioner presented a petition and complaint to the Court, stating that she was the widow of the late Hugh Cathcart, Esq. by whom she had four children; that the youngest of them, Miss Caroline Isabella Cathcart, had lately made choice of curators,

of whom Mr. William Cathcart, her uncle, was one; that that gentleman had placed her with her aunts in Edinburgh, and being in a delicate state of health, the petitioner had been extremely desirous to have access to her, but that this had been refused. She therefore prayed that the Court should grant an order 'to permit the petitioner to see her daughter at all convenient times.' In answer to this complaint, it was stated that the young lady was in extremely bad health; that the petitioner had married a second time, and that, from peculiar circumstances of a domestic nature, it was absolutely necessary that any interview should be avoided between the young lady and the petitioner; that if any interview was to take place, it might be productive of dangerous consequences, and that the respondents had never refused access to her on all proper occasions; but that the young lady had declined to see the petitioner. The Court, before answer, 'remitted to and requested Dr. Abercrombie to consider the present state of the health of the said Caroline Isabella Cathcart, and to report to the Court whether it is safe and proper in his opinion, in reference to her health, to see her mother at present, either in or out of his presence.' In consequence of this remit, Dr. Abercrombie (who was her usual medical attendant) reported 'that the said Caroline Isabella Cathcart is still in a very delicate and precarious state of health, requiring the utmost care and attention. I do not, however, see any objection to her being visited by her mother; but, under all the circumstances of the case, I earnestly recommend that the interview shall take place in the presence of a third person.' An order was accordingly issued in terms of this report; and the petitioner having thereafter moved for the expenses of the complaint, the Court found them due to neither party.

The Court were unanimously of opinion that the petitioner was entitled to have access to her child; but, in the peculiar circumstances of the case, and particularly as the young lady was in bad health, that any order to that effect must be qualified in the manner suggested by Dr. Abercrombie.

J. G. Hopkirk, W. S.—Hunter, Campbell, and Cathcart, W. S.—Agents.

T. MEGGET, W. S. Pursuer.—*Cockburn—Brownlee.*
Rev. A. BROWN, Defender.—*Sol.-Gen. Hope—W. Bell.*

No. 208.

Reference to Oath.—A party having referred to the oath of his opponent merely whether he was an onerous assignee, and he having deponed that he was—Held not competent to inquire whether he was a bonâ fide assignee.

Feb. 14. 1827.
1ST DIVISION.
Lord Eldin.
D.

AN action having been raised by a Mr. and Mrs. Brown against the defender, they obtained decree against him for about £100, for which he granted bills, and for the payment of which Mr. Couper, W. S. became bound as cautioner. The defender having failed to pay these bills, decree was obtained against Couper under his cautionary obligation, and ultimate diligence having been raised both against him and the defender, Mr. Megget, W. S. paid the debt to the extent of £65. 19s., and got an assignation to the diligence. He then brought an action against the defender, concluding for payment of the sum which he had so paid. In defence it was alleged, that Couper was possessed of funds belonging to the defender, which he was bound to have applied in extinction of the debt; that, prior to the assignation, he had become insolvent, of which Mr. Megget was aware; that the funds with which he had done so, had been obtained by him from Couper's friends; and, at all events, that he was not an onerous assignee. There being no evidence of these allegations, the defender referred to Mr. Megget's oath, 'whether the sums contained in the assigna-'tion narrated in the summons, and produced in process, were 'truly advanced and paid by the pursuer on his own account, 'and not on account of any other party, and whether he is an 'onerous assignee or not.' In answer to this, Mr. Megget deponed in substance that he had advanced the money from his own funds, at the request of a Mr. Richardson, the father-in-law of Couper, to the debit of whose account he had placed the amount, and against whom he had a right of relief, but that he had no written obligation to that effect; that he was aware that Couper was insolvent, and had executed a trust-deed prior to the time when he so paid the money; and that he was an onerous assignee.

It was then contended by the defender, That as it was proved that Mr. Megget had made the advance at a time when he was aware that Couper was insolvent, and that as he had done so at the request of his father-in-law, he was not entitled to the character of an onerous bonâ fide assignee, and therefore that the defender was entitled to plead the case as if the question were with Couper.

To this it was answered, That the reference did not embrace any allegation as to whether Mr. Megget was a bonâ fide assignee or not, but merely whether he was an onerous assignee; that he had deponed that he had paid the full sum from his own funds, and that the circumstance of conceiving that he had a right of relief against Couper's father-in-law could not affect the question.

The Lord Ordinary found the oath negative, and decerned in terms of the libel, and the Court adhered.

Lord President.—The oath proves that the pursuer paid the debt out of his own money, but at the same time he says that he did so on account of Richardson, the father-in-law of Couper. Then the question arises, did he do so to screen Couper from the claims of Brown? That is the true question at issue, and without being answered, the case is not exhausted. But the defender has not made any reference to that effect, and accordingly no question of that nature has been put.

Lord Craigie.—My difficulty arises from the terms of the reference. If the sole question related to the onerosity, I could have no doubt; but I apprehend that it is necessary that it should appear that the pursuer was a bonâ fide assignee. On this point the oath is by no means satisfactory; and I think we may still examine him as to his knowledge of the counter claims by the defender against Couper. As the oath stands, however, the interlocutor is right.

Lord Gillies.—There is no allegation here of mala fides, and on looking at the reference and at the oath, there is no attempt to prove any such allegation; and therefore, as the cause has been put upon the question of onerosity, we must adhere.

Lord Balgray concurred.

T. Megget, W. S.—A. Storie, W. S.—Agents.

No. 209.

Susanna Campbell, Pursuer.—*Maidment.*
Ann Campbell and Others, Defenders.—*Cuninghame.*

Husband and Wife—Aliment.—Held that a woman who has enjoyed the status of a wife, during the life, of a person who she alleged was her husband, is entitled after his death to an aliment hoc statu from his representatives.

Feb. 14. 1827.
1st Division.
S.

The pursuer brought an action of aliment against the representatives of the late William Campbell, weaver and portioner in Glasgow, alleging that she was his widow. This allegation having been denied, the Court 'allowed the pursuer a proof of her 'allegation that she possessed the status and character of the de-'ceased's lawful wife at the time of his death.' A proof was ac-

cordingly taken, from which it appeared that the pursuer had resided along with Campbell for a considerable time; that he repeatedly acknowledged her as his wife, and addressed her as such; that she had been formerly married to a sailor, of whose death there was no evidence; that Campbell had been impressed with the belief that she had been pregnant, and had brought forth a still-born child, whereas it appeared that she had assumed the appearance of pregnancy with the view to induce him to acknowledge her as his wife; and that the ceremony of an inlying, and of the burial of the child, had taken place.

The Court 'found the pursuer, in hoc statu, entitled to an aliment;' and thereafter, on advising a condescendence as to the amount of the funds and effects of the deceased, awarded an aliment to her in the mean while of £20 per annum.

Lord Balgray.—This is a question of aliment; and all we have to do at present, is to ascertain whether the pursuer possessed the status of the wife of the deceased at the time of his death. If we are satisfied that she did so, she is entitled to an aliment hoc statu; but our judgment will not affect the question as to whether de facto she was his wife. There are several circumstances which tend to show that she was not so, and which, among persons of a higher rank of life, would be entitled to much weight. But it is clearly proved that the deceased gave her at least the status of his wife in the society to which she belonged, and that she was received as such, and therefore she is entitled to an aliment.

Lord Craigie.—I am entirely of the same opinion. The existence of a former husband would be a most relevant circumstance in a question of marriage; but this is one of status.

Lord President.—I rather think there was a false pregnancy; but suppose that there had been so, and that the pursuer, knowing that the deceased wished to have an heir, had represented to him that she was pregnant, and that he had thereupon gone to a minister and acknowledged her as his wife, would that not be a good marriage? It is unnecessary, however, to decide that point, because there is evidence that she held the status, which in this question is sufficient.

Lord Gillies concurred.

T. Wilson, W. S.—W. Allan,—Greig and Peddie, W. S.—Agents.

No. 210. J. M'CLYMONT, Pursuer.—*Sol.-Gen. Hope—Whigham.*
P. HUGHES, Defender.—*D. of F. Moncreiff—Marshall.*

Trustee—Decree Cognitionis Causâ.—A party having accepted the office of trustee, along with another, for creditors, and having allowed his name to be used as such, but denying that he had intromitted with the funds, and alleging that this had been done exclusively by the other trustee, who was now bankrupt—Held,—1.—That he was, notwithstanding, accountable to a creditor, as if he had intromitted;—and,—2.—That a decree cognitionis causâ is sufficient evidence of a debt in a question with such trustee.

Feb. 14. 1827.

1ST DIVISION. Lord Eldin. H.

WILLIAM M'CLYMONT, merchant in Kirkcudbright, and son of the pursuer, having died insolvent, a meeting of his creditors was held in the month of May 1822, when they 'unanimously 'nominated and appointed Peter Hughes, merchant in Newton 'Stewart, and Robert Cochrane, accountant in Kirkcudbright, 'to be trustees for themselves and the whole creditors of the de-'ceased William M'Clymont, with full power to them to take all 'necessary steps, and all legal measures, for collecting and up-'lifting the outstanding debts as expeditiously as possible, as also 'to sell and dispose of the stock of goods, household furniture, and 'other effects which pertained to the deceased William M'Cly-'mont, and that either by public roup or private bargain, as to 'them may seem most beneficial for the interest of the creditors, 'and as expeditiously as possible.' No assignation or disposition was executed in their favour; but the keys of the repositories of the deceased were delivered to them, and the active management was thereupon taken by Robert Cochrane. The goods of the deceased were afterwards exposed to sale by public roup, the articles of which were signed by the defender; but a sale in this way having proved unsuccessful, the goods were afterwards sold by private bargain for £700. That sum, together with £300 more, was paid to Cochrane; and notice was publicly given to the creditors that the trustees were ready to pay to them ten shillings per pound, and payments were made to them accordingly, several of the receipts bearing that the money was received from the defender.

Among other claimants was the pursuer, who was ranked on the funds; but as his claim was considered suspicious, and no evidence of it was exhibited, no payment was made to him. Early in 1824 he raised an action against the brothers and sisters of the deceased for the amount of his debt, in which he obtained decree cognitionis causâ, but in which the defenders were assoilzied quoad ultra, in respect of a judicial renunciation.

In the mean while Cochrane, who had intromitted with the

funds, became bankrupt; and the pursuer, founding on the appointment of the defender Hughes as trustee, and on the decree cognitionis causâ, brought an action against him for payment of the dividend of ten shillings per pound.

In defence it was stated, That although the defender had been appointed one of the trustees, and his name had been occasionally made use of as such by Cochrane, yet he had not intromitted with the funds; that this had been done exclusively by Cochrane, for whom he was not responsible; and that there was no evidence of the debt claimed by the pursuer; and he therefore pleaded,

1. That as there had never been any conveyance to him of the funds of the deceased, and he had never intromitted, he could not be made liable for the debt; and,

2. That, supposing he were responsible for it, the decree cognitionis causâ tantum was not equivalent to a decree of constitution, and the pursuer was therefore bound to exhibit the documents on which that decree was founded, and on which he alleged his claim rested.

To this it was answered,

1. That as the defender had accepted of the office of trustee, and had acted as such, and as the whole effects of the deceased had been disposed of under his sanction, and funds had come into the hands of the trustees sufficient to pay the dividend claimed, he was bound to make it forthcoming; and,

2. That in a question with the defender, holding funds of the deceased, the decree cognitionis causâ was per se sufficient evidence of the debt; and therefore he was not obliged, so long as it was unreduced, to exhibit the grounds and warrants of it.

The Lord Ordinary decerned in terms of the libel, and the Court, without hearing the pursuer's counsel, adhered.

Lord Balgray.—I never saw a clearer case. Perhaps the defender did not actually intromit, but he admits that he accepted of the office of trustee, and allowed his name to be used as such, and it is proved that he undertook to pay the dividend to the creditors. The only question therefore is, Whether the pursuer has produced a title as a creditor? He founds on a decree cognitionis causâ, and, before he obtained it, he must have produced his grounds of debt. In a competition with creditors, such a decree may be liable to be opened up; but here the question is with a trustee, who either has, or must be held to have, funds in his hands to pay the debt. The decree, therefore, is a sufficient warrant to him to make payment.

Lord Craigie.—I have no objection to adhere, provided the question as to the amount of the debt be reserved; because I apprehend that, notwithstanding the decree cognitionis causâ, the defender, as trustee

for creditors, is entitled to show either that no such debt is due, or not to the extent alleged.

LORD GILLIES.—We must hold this party as intromitting with the whole effects, and we have evidence that the trustees bound themselves to pay a dividend of ten shillings per pound to the creditors. Now, the pursuer comes forward and produces to him a decree cognitionis causâ, which instructs that he is a creditor; he has therefore a sufficient title to demand payment as a creditor. It is said, however, that the debt is not due; but in the closed record there is not a word to that effect. All that is said is, that the proper evidence of it has not been produced; but there is no allegation made that de facto the debt is not due. In this case the decree is sufficient evidence of the debt.

LORD PRESIDENT.—Until the decree is suspended or set aside, we must give full faith to it; and on the other point, as to the liability of the defender, I concur with the opinions which have been delivered.

Pursuer's Authority.—1. Ersk. 7. 20.

Defender's Authorities.—Dick, March 12. 1685, (14064); Hamilton, Dec. 20. 1709, (14064); Goldie, Nov. 28. 1752, (14065.)

D. and A. THOMSON, W. S.—MACMILLAN and GRANT, W. S.—Agents.

No. 211. J. B. FRASER, Suspender and Pursuer.—*D. of F. Moncreiff—Forsyth.*

GEO. FRASER, Charger and Defender.—*Jameson—Ivory.*

Settled Account — Property-Tax.—Held,—1.—That it is not competent, after a regular settlement of accounts, and a species of transaction, to open them up to the effect of reviewing the principles on which the settlement has been made; —and,—2.—That interest having been paid for a series of years, during the period when the property-tax statute was in force, without deducting that tax, it is not competent to withhold payment of a balance to that extent,—the debt on which the interest arose being originally a West India debt, and being payable in London, and it appearing that no such relief would be allowed in England, or at least that the party must go to the Courts there to seek such relief.

Feb. 14. 1827.
1ST DIVISION.
Lord Eldin.
H.

JAMES FRASER of Gorthleck was proprietor of a plantation in Dominica, and his son Alexander of one in Berbice. The charger, George Fraser, was the consignee and agent in London of these parties, and in the course of their transactions he became their creditor to a considerable amount, and for payment of the portion of the debt due by Alexander his father James bound himself as cautioner. On the death of James Fraser, he was succeeded by his eldest son Thomas, who thereby became liable both for the debt due by his father, and also by his brother Alexander. In February 1813 it was ascertained that the proper debt of

James Fraser amounted to £3040: 11: 3, while that due by Alexander (for which James and his son Thomas, as representing him, was liable) amounted to £6682: 4: 5, making in all £9722: 15: 8. At this time Thomas Fraser was residing in the East Indies, and had authorized the suspender, his brother, Mr. James Bristow Fraser, writer in Edinburgh, to act as his commissioner. Accordingly a settlement was, on the 29th of July 1812, made by that gentleman of the accounts, by a letter which he addressed to the charger in these terms:—'London, 29th July '1812.—Mr. George Fraser.—Sir, Having, as commissioner for 'my brother, Thomas Fraser, examined your accounts with the 'estate of our late father, James Fraser of Gorthleck, Esq. and 'likewise your accounts with my brother Alexander Fraser, '(under our said father's guarantee,) and compared the same 'with the vouchers, I find the same correctly stated, and that the 'balance due to you on the former, on the 3d of February last 'past, was - - - £3040 11 3

'And the balance due on the latter, on the same 'day, was - - - 6682 4 5

'Making together £9722 15 8

'Say nine thousand seven hundred and twenty-two pounds fifteen 'shillings and eightpence; which sum of £9722: 15: 8, together 'with the interest arising due thereon, I hereby engage, as my 'brother's commissioner, to pay you in London, by instalments, 'in terms of our former agreement.' It was then specified that the total sum was to be payable in four instalments, at Martinmas 1812, 1813, 1814, and 1815. At the same time the suspender, as commissioner for his brother, granted two separate corroborative bonds over the estate of Gorthleck in Inverness-shire, now belonging to Thomas Fraser, the one for the sum of £3040: 11: 3, and the other for £6682: 4: 5, payable at the above periods, with the interest from February 1812 till the respective terms of payment. These sums, it was expressly stipulated, should be paid 'in the city of London, free of all charges and deductions;' and again it was declared, 'that the whole of the said debt shall be so 'payable in London, where the same was originally contracted.'

None of the instalments were, however, paid at the stipulated periods, and in the mean while the debt due by the Dominica estate, belonging to Thomas Fraser, had by new transactions been increased to £5643: 1: 2. For this sum the suspender, as commissioner of his brother Thomas, on the 3d of April 1816, granted a bond to the charger, on the narrative that it was the 'balance 'of accounts relating to certain plantations and estates in the said

'island of Dominica, this day stated and settled between the said 'George Fraser and the said Thomas Fraser by the said James 'Bristow Fraser, his attorney;' and he thereby 'promised the 'said George Fraser that he shall, on or before the 31st Decem- 'ber next ensuing, be paid, by a good acceptance in London, the 'sum of £1000 in part satisfaction of the whole of the said debt, 'and that he shall, on or before the 1st February next ensuing, 'be paid the further sum of £5000, in further satisfaction of the 'whole of this said debt, and that all the residue of the whole of 'the said debt, with interests and costs, shall be paid on or before 'the 1st of February 1818.' This not being done, the charger adopted legal proceedings against Gorthleck; but he discharged them on the 12th March 1818, and agreed to receive payment of the balance due to him by instalments. Between that time and the end of 1824, the debt due out of the Dominica estate was extinguished, and that due by Alexander Fraser was reduced to about £2000. In paying the interest no allowance had been made for property-tax, nor did it appear to have been taken into consideration by either party.

In the mean while Thomas Fraser had died, and the suspender having succeeded him, presented a bill of suspension as of a threatened charge, on the ground, first, That he was entitled to deduction of the property-tax from the interest payable under the arrangement of 1812; and, second, That he was entitled to go into a count and reckoning with the charger, to the effect of showing that the balance was less than that which the charger alleged to be due. Lord Medwyn passed 'the bill in 'so far as regards the property-tax, stated in the calculation of the 'suspender to amount to £63. 7s. on the one debt, and £139. 4s. '6d. on the other, and refused it quoad ultra;' and his Lordship at the same time issued the following note:—'The settlements of 'balances have been too numerous and too solemn to admit of 'payment being stopped by such a proceeding as the present, on 'the allegation that it is necessary to examine all the vouchers of 'the account. Nothing can be more formal than the settlement 'which took place on the 12th March 1818, when the charger, 'on his part, agreed to receive payment of the remaining balance 'by certain instalments, and discharged the legal proceedings 'commenced against the estate of Gorthleck. No special objec- 'tion is yet made to any of the articles of the account so settled, 'except as to the accumulation of the interest, and that property- 'tax has not been deducted. The first is clearly ill-founded. As 'to the objection relative to the property-tax, perhaps it is fore- 'closed by the repeated settlements, founded, it is said, on mer-

'entile usage; but the words of the property-tax act (not quoted, 'however, by either party) are very strong.'

The suspender then brought an action of count and reckoning, and contended,

1. That the settlements which had taken place were not of such a nature as to exclude him from showing that he had either just claims of deduction from the charger, or that those which were made by him were unfounded; that the accounts had been made up on unjust principles, because the charger, instead of allowing twelve months credit, to which the debtors were entitled, had allowed only six; and that he had accumulated interest upon interest.

2. That at all events, as it was admitted that no deduction had been given for property-tax from the interest payable between 1812 and 1816, and as the debt was secured upon a Scotch estate, it must be regarded as a Scotch debt; and as it had been settled by repeated decisions of this Court that a party was entitled to be allowed such deduction after a final settlement, and even to get repetition, the accounts must be rectified to that extent.

To this it was answered,

1. That after the solemn and deliberate settlements which had been made, the first of which was of the nature of a transaction, it was not competent to open them up, and to go into a general count and reckoning; and,

2. That as the debt was due by parties residing in the West Indies, who were not liable in property-tax,—as it was merely a balance on an account-current between merchants who did not pay property-tax on the interest of such accounts, but on an average of annual profits,—and at all events, as it was payable in London,—and as it had been settled by repeated decisions of the English Courts (contrary to those of this Court,) that where interest had been paid without deducting property-tax, and the creditor had been allowed to consume it bonâ fide, it was not competent to demand repetition, and as the question here must be decided according to the English rule, the suspender could not insist for repayment.

The Lord Ordinary at first 'found the suspender entitled to 'deduction from the sums charged for, of the property-tax upon 'the whole interest that became due to the charger from the 3d 'day of February 1812, the date of balancing the charger's ac-'counts, to the 5th of April 1816, when the tax ceased.' But thereafter, on advising a representation, his Lordship altered, repelled the reasons of suspension, and in the count and reckoning sustained the defences, and assoilzied the defender; and the Court adhered.

LORD BALGRAY.—It is impossible to get over the settlement in 1822, and that the more especially, as it has been made the foundation of all the subsequent arrangements. Where there are errors in the calculation, they may be corrected at any time; but after there has been a solemn settlement of the whole matters in dispute between the parties, it is impossible that we can open it up, and rectify the principles on which the arrangement has taken place. The suspender says that the accounts should have been made up on the principle of receiving twelve months credit, whereas only six were allowed; but this is now too late; and besides, the charger agreed to postpone payment of his debt for several years. I have some difficulty as to the property-tax. It is of the nature of a right of retention, and so long as the debt is not entirely paid, it may be exercised; but if the debt be paid out and out, then perhaps the creditor may, in a question of repetition, have a plea of bonâ fide consumption. In this case there is, no doubt, a balance still due; but we must attend to the nature of the debt. It was a West Indian debt, due by parties residing in the West Indies, to which the Property-Tax Act did not reach, and was payable in London. The heritable bonds were merely corroborative securities of that which was truly a mercantile debt; and as the interest was payable in London, the question comes to be, whether the payments made there were lawful payments or not? But the suspender ought to have gone to the English Courts to have had that point decided; and it appears from their decisions that he would not have been entitled to any relief. I do not see, therefore, how we can find that these payments were unlawful, and so order repetition, or allow retention.

LORD GILLIES.—I am of the same opinion. The only difficulty of the case relates to the property-tax. If the suspender had paid that tax on a proper Scotch debt, he would have been entitled to retention; but this was a West Indian debt, and it is therefore extremely doubtful whether property-tax was exigible. But, besides, it was to be payable in London; and if the suspender says that he has made an over-payment there, he must go to the English Courts to have that question decided.

LORD CRAIGIE.—I am entirely of the same opinion. There was here not only an accounting, and a balance struck, but there was a transaction, and therefore it is impossible to open up the accounts. With regard to the heritable bonds, they were merely corroborative securities of a debt due in the West Indies, and for which the granter was a cautioner. It cannot therefore be properly characterised as a Scotch debt.

The LORD PRESIDENT concurred.

Suspender's Authorities.—Butchard, Dec. 16. 1814, (F. C.); Wilson, May 24. 1822, (ante, Vol. I. No. 487); Weavers of Ayr, June 13. 1823, (ante, Vol. II. No. 376.)
Charger's Authorities.—1. Barn. and Ald. 123; 1. Brod. and Bing. 37.

J. B. FRASER,—T. MACKENZIE, W. S.—Agents.

J. and J. JACK, Advocators.—*Cuninghame.*
J. BARTON, Respondent.—*Rutherfurd.*

No. 212.

Heritable Creditor.—An heritable creditor having entered into complete and sole possession of the subjects over which his security extended, and having charged a factor's fee, held liable in a factor's diligence, and accountable as such, although the heritable bond declared that he should not be bound to do diligence against tenants, and should only be accountable for actual intromissions.

Feb. 14. 1827.

2D DIVISION.
Ld. Cringletie.
F.

BARTON granted to Jacks a disposition in security of £250 borrowed money over certain houses, inhabited chiefly by working people, with a power to enter into possession by uplifting the rents, &c.; but declaring that they should not be bound to do diligence, and that they should be accountable only for their actual intromissions. In 1810 Jacks obtained a decree of mails and duties, and in 1812 they entered into complete possession, taking the sole charge of uplifting rents, outputting and inputting tenants, &c., for which, in accounts subsequently rendered, they charged a factor's fee of five per cent. on the rents recovered. In an action of count and reckoning brought by Barton in 1823 before the Sheriff of Lanarkshire, Jacks admitted that they had kept no regular account of the rents received, but had made up that given in by them in a great measure from memory.

To the accounts so lodged it was, inter alia, objected,

1. That Jacks ought to have charged themselves with all arrears of rent, seeing that they had neither done diligence, nor intimated to Barton the failure of the tenants to pay, and had charged a factor's fee; and,

2. That they were not entitled to take credit for a sum of expenses incurred in a litigation with Niven, one of the tenants, who had succeeded in defending himself against an action for rent on the ground of a counter claim of damages, in consequence of his house not having been kept in proper repair. The Sheriff, 'in 'respect the defenders entered into possession of the subjects be-'longing to the pursuer, and conveyed to them by the bond, 'took the management thereof, and were the sole intromitters 'with the rents, and that they do not allege, and do not prove, 'that they gave regular notice to the pursuers of the tenants 'having failed in payment of their rents; and in respect of the 'defenders having made a charge for factor's fee, found that 'they are liable in the diligence prestable by regular factors, and 'are accountable as such to the pursuers.' He therefore remitted to an accountant to make up a report on these principles, and subsequently decerned in terms of the report. Jacks advocated;

but the Lord Ordinary remitted simpliciter, and the Court unanimously adhered.

The Lord Ordinary observed in a note:—

The Lord Ordinary has advised this representation, and assents to all the reasons of the Sheriff's interlocutor. It is true that by the heritable bond it is declared that the representer should not be bound to do diligence, because doing it might occasion both trouble and idle expense; but, if he did not do diligence, common justice required him to give notice to the respondent that the rents were unpaid, and so enable him, particularly for rents of small houses, to use his right of hypothec, and recover them; whereas, when he got no notice, he was entitled to believe and rely that the rents were paid. 2. Since the representer chose to charge factor's fee at the rate of 5 per cent., he undertook the duties incumbent on a factor, and thereby departed from the stipulation in his heritable bond, that he should not be bound to do diligence. Lastly, Since the representer chose to take upon him to output and input tenants, he undertook the duty incumbent on every landlord of a house to keep it habitable and tenantable; and if he chose to fail in this, and involve himself in an unsuccessful lawsuit with his tenant, it is impossible to indemnify him of expenses incurred by his own carelessness. The case of Mackechnie *v.* Clark is toto cœlo different from this. In that it was laid down, or to be extracted as a rule, that when a creditor gets assigned to him a debt in security of one owing to him, he is entitled to the expenses of making effectual or recovering the debt so assigned. Surely this does not apply to entitle him to get the expenses of an idle or ill-founded lawsuit which he raises and loses, instead of recovering the subject; and that was what happened to the representer in his action against Niven.

The Judges concurred.

Advocators' Authority.—Mackechnie, July 10. 1752, (14117.)

W. WADDELL, W. S.—J. G. HOPKIRK, W. S.—Agents.

W. GODDARD, Pursuer.—*D. of F. Moncreiff—Ivory.* No. 213.
LEITH DOCK COMMISSIONERS, Defenders.—*Sol.-Gen. Hope—L'Amy—Tawse.*

Title to Pursue—A member of a Board of Commissioners elected under authority of an act of Parliament is entitled to pursue a reduction of an act done by the Board, on the ground of its having been carried by the votes of two Commissioners who were disqualified, without his being obliged to conclude for reduction of the appointment or commission in virtue of which these persons acted.

Feb. 14. 1827.

2D DIVISION. Lord Newton. B.

BY the late Act for the Improvement of the Dock and Harbour of Leith, it is appointed that certain bodies shall annually elect persons to act as Commissioners along with certain ex officio Commissioners nominated in the act; and in particular the Magistrates and Council of Edinburgh are empowered to nominate as Commissioners (besides five members of their own body) two persons who shall be merchants in Edinburgh, and shall not be members of Council. It is also provided, that in the event of a supervening disqualification after a Commissioner has been elected, the Board of Commissioners shall intimate the same to the body by whom such person may have been elected, and, on their failure to elect a new Commissioner within one month, the right of election may be exercised by the Board; and persons who are disqualified, and yet act as Commissioners, are subjected to a penalty of £20 for every such acting. Under authority of this act, the Magistrates and Council of Edinburgh elected, as the two merchants of Edinburgh, Mr. Cockburn and Mr. Brown, who accordingly took their seats at the Board, and acted as Commissioners. At a meeting, however, held shortly thereafter for the purpose of appointing a superintendent of the harbour, the pursuer Goddard, who then for the first time took his seat at the Board, objected to Mr. Cockburn being allowed to vote, on the ground that he was disqualified from acting as a Commissioner, not being a merchant in Edinburgh. The meeting overruled the objection, and Mr. Cockburn gave his vote accordingly for Mr. Dall, for whom Mr. Brown also voted, and who was declared to be elected by the casting vote of the chairman. Of this election Goddard brought a reduction, on the ground, inter alia, that Cockburn and Brown were disqualified, and that their votes therefore ought not to have been received; but he did not conclude for reduction of the election of these persons as Commissioners. As a preliminary defence against this action it was pleaded, that 'the pursuer has no title to call in 'question the qualification of the defenders Messrs. Brown and 'Cockburn to vote in the election of a manager and superintend-'ent of the harbour and docks on the 21st July last, especially

'in an action which does not conclude for reduction of the commission or appointment under which they had been received and 'sat as members of the Board of Commissioners, and in which 'they are nominated as qualified persons, in terms of the act of 'Parliament.'

In support of this defence it was pleaded, That as the statute gave power to persons holding an appointment from the bodies privileged to elect Commissioners, to sit and vote as such, their right to do so could not be questioned on the ground of their being disqualified at the date of their appointment, (especially by an individual Commissioner,) without a reduction of that title which by force of the statute gave them a power to act; and as to any supervening disqualification, that it was clearly intended by the statute that the general Board alone should be entitled to judge of that, as they were appointed to intimate the disqualification to the electing bodies.

The pursuer answered, That the question, whether he was entitled to reduce the election of the superintendent, without also reducing the commissions of the persons whose votes he objected to, was not a question of title, but one on the merits; that he was willing, however, to argue it as if it were an objection to title; and he contended that as the act of Parliament only gave a power to elect persons qualified in a certain way, if the electing bodies elected an unqualified person, his appointment was not protected by the statute, or if he became subsequently disqualified, his acting was not sanctioned by the statute; and that any single Commissioner, therefore, had at common law a sufficient title and interest in either case to object to his acting, and to pursue reduction of acts done in consequence of his invalid vote, without the necessity of setting aside his appointment, which he could often have no interest to do, as the elections were annual, and as the party whose appointment was sought to be reduced might consequently be out of office before any procedure could be had in the action. The Lord Ordinary repelled the defence, and the Court unanimously adhered.

LORD GLENLEE.—The objection here is certainly not to the title, but to the form of the libel as laid; but it has been argued as an objection to the title, and taking it in that view, the interlocutor of the Lord Ordinary is right. May it not be ascertained whether an election is effectual to give a person a certain right, without setting the election aside? Suppose a married woman is nominated as a tutor to children, is it necessary for the co-tutors to set aside the nomination, in order to prevent her from acting? Clearly not; and I do not see any greater necessity for a reduction here. Suppose Goddard had

merely brought a simple action, concluding that Cockburn was disqualified, I could see no objection to such an action, and I am therefore for adhering.

LORD PITMILLY.—This is not an objection to the title, which is unquestionable, but to the form of action; and, even if good, it would go no further than that the process should be sisted till a reduction were brought. The act of Parliament points out distinctly the qualification under which alone Commissioners are entitled to act; and it is a sufficient ground of reduction of any act done by them, that it was carried by the suffrage of a person not qualified to vote. There is no necessity to reduce the party's election, and often no interest; as for instance, if the act here challenged had happened the day before Cockburn was to go out of office. I have no doubt that the interlocutor is right.

LORD ALLOWAY.—I am entirely of the same opinion. It is a common law right in every case for any party having interest to crave redress against a wrong which he has suffered. If Goddard's vote has been counteracted by the vote of a person not qualified, unless expressly excluded by the statute, he is entitled to pursue reduction of the act done. In the case of Calder regarding the election of a clergyman, the privilege of voting depended on feudal rights; but could it ever have been pretended that a vote could not be challenged, without reducing the titles of the persons whose votes were objected to? The clause in this act, too, imposing penalties on disqualified persons who shall act, makes it quite clear; for it is impossible that a vote should be counted, which subjected the person to a penalty for giving it.

LORD JUSTICE-CLERK.—I have little to add to the opinions delivered. Looking at the whole act of Parliament, I cannot alter the interlocutor. If any wrong be done by a majority of Commissioners, any member is entitled to bring the matter before this Court for redress, unless expressly excluded by statute.

W. BELL, W. S.—MACRITCHIES, BAYLEY, and HENDERSON, W. S.—Agents.

D. SMITH, Petitioner.—*D. of F. Moncreiff—Matheson.* No. 214.

Sequestration—Bankrupt—54. Geo. III. c. 137.—A discharge on a composition granted to the sole constituent members of a company under sequestration, both as partners and individuals in respect of no objection, and the sequestration at the same time declared to remain effectual as to the company and its effects.

Feb. 15. 1827.

1ST DIVISION.

DUNCAN SMITH and one Jones, the sole partners of the firm of D. Smith and Company, whose estates had been sequestrated, presented petitions stating that their creditors had agreed to accept of a composition, and grant them a discharge so far as regarded the claims against them as partners and as indivi-

duals, but stipulating that the sequestration should subsist in relation to the estates of the company; and they therefore prayed the Court to approve of the composition, and grant a discharge accordingly. When the petitions were moved, the Court expressed great doubts as to the competency of discharging the sole constituent members of the company, and at the same time to declare that the sequestration should subsist as against the company itself. After, however, delaying the case for consideration, they pronounced this interlocutor on the petition for Duncan Smith, and a similar one on that of Jones:—'Declare the sequestration at an end in so far as regards the said Duncan Smith 'as a partner of the said concern of D. Smith and Company, and 'as an individual, in respect that none of the creditors are objecting; but find the sequestration shall still subsist as to the 'company, and the company's whole property, estate, and effects; 'recall the sequestration to the above extent accordingly,' &c.; 'find the said Duncan Smith, as a partner of the said company, 'and as an individual, discharged of all debts contracted prior to 'the date of sequestrating his estate, except as to payment of the 'said composition,' &c.

A. BURNS, W. S. Agent.

No. 215.

E. TURNER, Suspender.—*Donald.*
GIBB and M'DONALD, Chargers.—*Jeffrey.*

Feb. 15. 1827.
1ST DIVISION.
Bill-Chamber.
Lord Newton.
S.

THIS was a question as to the property of certain goods claimed by Turner, which the Sheriff of Edinburgh found belonged to Gibb and M'Donald; and the Lord Ordinary and the Court refused a bill of suspension.

R. CAIRNS, Agent.

No. 216.

LORD LYNEDOCH and Others, Pursuers.—*Fullerton—Jameson.*
J. OUCHTERLONY, Esq. Defender.—*Murray—Rutherfurd.*

Trustee.—Several trustees having been nominated by a deed of settlement, and three declared to be a quorum, and all of them having accepted, and the number having been reduced by death to three—Held that one of them, who, although he had accepted, yet declined to act, was bound to concur with the other two in all reasonable and proper acts of administration, and in particular in uplifting part of the trust-funds, the loan of which he alleged he had disapproved of.

Feb. 15. 1827.
1ST DIVISION.
Lord Eldin.
H.

THE late John Kinloch, Esq. of Kilry, by a disposition and deed of settlement dated the 7th of July 1802, conveyed his whole estates to Lord Lynedoch, (then Colonel Graham) George Dempster, Esq. of Dunnichen, William M'Donald of St. Martin's, writer

to the signet, his son William M'Donald, Esq. and the defender Mr. Ouchterlony, and to the survivors of them, and the acceptors, as trustees for special purposes, and particularly for investing £12,000 in lands, to be entailed in favour of the same series of heirs, and under the same conditions, as contained in his entail of the estate of Kilry. He also provided, that any three of the trustees accepting should form a quorum, and that they should not be answerable for omission, but each only for his own actual intromissions. By a subsequent deed he appointed his son and heir of entail, Colonel Kinloch, to be an additional trustee.

All the trustees (including Mr. Ouchterlony) accepted; and after the death of Mr. Kinloch, having invested about £8500 of the above sum of £12,000 in lands in the manner provided by the trust-deed, they lent £1000 of the balance to Colonel Kinloch on his own and another gentleman's personal bond; and in 1816 they lent to him £2486, being the remaining part of the £12,000. This latter sum they gave to him upon the security of his own bond, and an assignation by him of a policy of insurance for £2500, which he had effected on his life with the Royal Exchange Assurance Company. Mr. Ouchterlony did not concur in, nor, as he alleged, was he made aware of these loans; and he stated that when he was informed of them, he disapproved of them. The arrangement, however, was sanctioned by a quorum of the trustees, consisting of Lord Lynedoch, Mr. Dempster, and Mr. M'Donald; and the deeds, particularly the assignation, were taken in favour of the whole trustees nominatim, including Mr. Ouchterlony.

On the 17th of May 1824 Colonel Kinloch died, whereby the trustees acquired right to uplift from the Assurance Company the sum of £2500. By this time both Mr. M'Donald senior of St. Martin's, and Mr. Dempster of Dunnichen, had died, so that, without Mr. Ouchterlony, there was not a quorum of trustees. In order to uplift the money, it was necessary to have his concurrence in granting a discharge; but he declined to give it, stating that he had all along disapproved of the loans, and that he did not wish to connect himself with the transaction in any manner, lest, in the event of any loss having been sustained by it, he might thereby expose himself to liability under the clause relative to intromissions. The Assurance Company having refused to pay the money, except with his concurrence, the other two trustees, Lord Lynedoch and Mr. M'Donald, brought an action against him, concluding that he should be ordained to perform his duty as trustee in all respects, and in particular to concur with them in granting a discharge to the Assurance Company, and in receiving payment of the money.

In defence Mr. Ouchterlony maintained,

1. That as his acceptance of the office of trustee took place under the condition that he should not be liable for intromissions, unless he actually intromitted; that if he were to concur in the demand made upon him, he would of necessity expose himself to such a responsibility; and as he had all along disapproved of the transaction, and considered it injurious to the estate, and as at all events, whether loss and damage had been sustained or not, he could not be required to place himself in a situation which might give rise to a demand against him on that account, he could not be compelled to do so; and,

2. That although the assignation was taken in his favour, yet this had been done without his consent; and it was therefore incumbent on the other trustees who had done so, to extricate themselves in the way which they thought best, without implicating him.

To this it was answered,

1. That as he had accepted of the office of trustee, he was bound to perform the duties of it, and was not entitled to withdraw or resign, more especially as there was no longer a quorum without him; and,

2. That as the uplifting of the money and granting the discharge was a proper and reasonable act of administration, and would have the effect of restoring matters to the same situation as if no loan had been made, he was not entitled to withhold his concurrence from the accomplishment of that object.

The Lord Ordinary found 'that the defender John Ouchterlony is not at liberty to withdraw himself, and renounce the management of the trust-estate, as one of the trustees appointed by the trust-deed in question, executed by the deceased John Kinloch; but that he is bound to act as trustee along with the pursuers in granting a valid discharge to the Corporation of the Royal Exchange Assurance in London for the sum of £2500 sterling, mentioned in the summons, contained in the policy of insurance by said corporation, and in recovering payment of the same, and in general in the management, recovery, and application of said trust-estate, until the trust-affairs shall be finally wound up and brought to a conclusion, in terms of the before-mentioned trust-deed; and found and declared that he is bound, in the future management of the estate, to act along with the trustees, and to concur with them in all proper and necessary acts of administration, and decerned accordingly.'

The Court adhered.

LORD PRESIDENT.—The defender may have acted rightly in refusing to lend the money in the way in which it was done; but what he is here required to do is to consent to take the money from the Assurance Company, and so remedy that which he alleges ought not to have been done. I therefore think that he is bound to concur in doing so.

LORD BALGRAY.—By accepting of the office of trustee, the defender necessarily agreed to submit to the opinion of the majority; and indeed, if he were permitted to resist that opinion, he would just be making himself a sine quo non. If he had conceived the loan an improper transaction, he ought to have complained to this Court, but he did not do so; and the question now is, not as to the loan, but as to the repayment of the money. This cannot be accomplished without his concurrence, as there would otherwise not be a quorum; and as it is a reasonable and proper act of administration, I think he is bound to concur.

LORD GILLIES.—I am of the same opinion. The clause constituting a quorum declares that any three of those who have accepted shall form it. If he had wished not to act, he ought not to have accepted; but by accepting he is bound to act, and in doing so he is not entitled to resist the will of the majority, and to say to them, sic volo, sic jubeo. If he resisted the lending out of the money, it seems somewhat inconsistent to resist the taking of it back.

LORD CRAIGIE concurred.

D. WATSON,—A. PEARSON, W. S.—Agents.

S. SHARRAT, Pursuer.—*Baird—Coventry.*
J. TURNBULL, Defender.—*More—Pringle.*

No. 217.

Sale—Implied Obligation.—Circumstances under which a merchant to whom goods had been sent as having been purchased by him, but which he alleged had been bought by another party, and not having sent notice of the alleged mistake debito tempore, was held liable to pay the price.

Feb. 15. 1827.

1ST DIVISION. Lord Eldin. D.

THE pursuer Sharrat, a manufacturer in Staffordshire, brought an action against Turnbull, a merchant in Selkirk, alleging that on the 9th of May 1823 he had, in consequence of a previous order, sold and transmitted to him a quantity of scales and other ornaments for yeomanry helmets, of the value of £29 : 4 : 6, for payment of which he concluded. In defence it was stated, That the pursuer having been in the defender's shop receiving orders for other goods, a Mr. Clarkson (who was one of the officers of the Selkirkshire yeomanry) ordered those in question; but that the pursuer, instead of sending them to that gentleman, had transmitted them to the defender along with the other goods, and that, immediately on receiving them, the defender had inti-

mated their arrival to Mr. Clarkson, who, on the 15th of June, wrote to the pursuer, informing him that they had been overcharged—that a greater number had been sent than had been ordered—and that they lay with the defender at the disposal of the pursuer, unless a great deduction were made. In answer to this it was stated by the pursuer, That he had received the order from the defender alone, and had immediately made an entry to that effect in his order-book; that he was entirely unacquainted with Mr. Clarkson, who was not a trader; that, along with the goods, he had sent an invoice of them, addressed to the defender, who never gave him any notice that any mistake had been committed; that the only intimation which he had received on the subject was from Mr. Clarkson, at the distance of more than four weeks after the goods had been sent; that it was not then stated that any error had been committed in sending them to the defender, but merely that the price which the pursuer had charged against the defender was too large; and that accordingly the defender himself, in a letter which he wrote to the pursuer after raising the action, put his defence entirely upon that footing. He therefore contended,

1. That the circumstances proved that the defender was the purchaser; and,

2. That at all events, as they had been sent to him, accompanied with a regular invoice, and no objection had been made to them from the 9th of May to the 15th of June, when Clarkson's letter was dispatched, he must be held liable for them.

On the other hand, it was maintained by the defender that the proper debtor was Mr. Clarkson; that if any mistake had been committed, it was by the pursuer, and that no implied liability could be raised against the defender by delaying to rectify a mistake originating with the pursuer himself.

The Lord Ordinary, after allowing a proof, decerned in terms of the libel, and the Court adhered.

Lord President.—If there had been any mistake, it was the duty of the defender, on receiving the goods, to have intimated this to the pursuer, and to have informed him that he had delivered them to the proper party, and that he was to look to him for his payment; but this he did not do. I think, therefore, he is liable.

Lord Balgray.—At first I was disposed to think that the interlocutor was wrong; but I am now of a different opinion. There appears to have been a mistake on the part of the pursuer as to the party who ordered the goods. This, I think, was done by Clarkson; and if the case had rested there, the defender must have been assoilzied. But the goods were sent on the 9th of May to the de-

fender, along with others which had been bought by him, and all of which were included in one invoice, specially addressed and charged to the defender. This he could not fail to see; and, as a trader, he must also have known that they would be entered accordingly in the pursuer's books. It was therefore his duty, on receiving the invoice, to have notified the error to the pursuer by the first post, and to have informed him that he had handed them to Clarkson. But the only notice which was sent to the pursuer is dated the 15th of June, and was sent by Clarkson, who referred him to the defender; and again the defender, in his letter written several months thereafter, did not pretend that they had been improperly addressed, but only that the price was too great.

Lord Craigie.—The real nature of the transaction appears to me to have been this:—Clarkson happened to be in the defender's shop, wanting the articles in question, at the time when the pursuer was there; and the defender not having them, the pursuer agreed to send them through the defender, who in this matter was to be a mere agent, while Clarkson was to be the purchaser. The pursuer accordingly executed the order by sending them to the defender, who immediately delivered them to Clarkson as the proper party. It is said, however, that the defender ought immediately to have notified to the pursuer that there had been a mistake. But this is requiring a degree of accuracy and strictness from a country shopkeeper, which could only have been insisted for from a merchant on an extensive scale, and appears to me to be straining the doctrine of implied liability too far.

Lord Gillies.—I am satisfied that the defender is the proper party. The pursuer, an English merchant, goes into a country shop, and a person comes into it inquiring for goods. The shopkeeper has them not at the time, and, in the course of the conversation which takes place, they are ordered from the pursuer. It is clear that he must have regarded the defender as the purchaser. Clarkson was to him an utter stranger; and he could not have invoiced and sent the goods to one of whose address he was entirely ignorant. Accordingly he sent the goods to the defender, and at the distance of more than a month Clarkson writes, complaining of the price, but referring to the defender. Throwing out of view, however, all the other circumstances, it seems to me sufficient to make the defender liable, that a regular invoice was sent to him along with the goods—that they were received, and no objection made by the defender.

Lord President.—In reference to what has been said by Lord Craigie, it is impossible to distinguish between a large and a small dealer; for how could we do so, or where is the line of distinction to be drawn? The defender, however, appears to be a person in considerable business for the district of country in which he resides, and must be in the daily habit of receiving goods, and at all events could not fail to see that the invoice was addressed to him, and

therefore that he was charged with the contents. Indeed I know that manufacturers often send goods without any order, merely stating that they are such as may be serviceable to the retail dealer; and the understanding distinctly is, that if they are not immediately rejected, and notice given to that effect, the party to whom they are sent is held to be the purchaser.

R. Wilson,—C. B. Scott, W. S.—Agents.

No. 218. J. Smith, Pursuer.—*Murray—D. Dickson.*
Sir H. Innes, Defender.—*Brown.*

Reparation—Master and Servant—Process.—Held that in an action of damages against a master, for having verbally charged a servant before a Justice of Peace with fraud, and examined a number of witnesses without any warrant, it was not necessary to libel malice, as if it had been a regular judicial proceeding.

Feb. 15. 1827.
1st Division.
Lord Meadowbank.
H.

The pursuer, who had been for several years farm-grieve of the defender, and had been employed by him during a period of scarcity to dispose of meal among the tenants and cottars on the defender's estate, brought an action of damages against him, in which he alleged that at first the defender had purchased and sold the meal on his own account, but that having suffered considerable loss, he latterly entered into an arrangement with the pursuer, by which the defender was to advance the funds necessary for purchasing the meal, which was to be charged against the pursuer, who should be allowed all the profit, and suffer all the loss, which might thence arise;—that the defender pretending that the pursuer was acting merely as his servant, and that he had defrauded him, made a verbal complaint of fraud against him to a Justice of the Peace, before whom he brought a great number of witnesses, who were examined upon oath, and their depositions taken down in writing;—that no petition was presented, and no warrant of any nature issued, and the pursuer was not allowed to be present to vindicate his character;—but that no further steps were adopted, nor was any judgment pronounced in consequence of this investigation.

He further alleged, that about the same time the defender's law-agent wrote a letter to the factor on his estate as to the pursuer's conduct, in which, inter alia, he stated that the defender 'views himself defrauded in the meal transactions;' and that again, in a litigation which took place in the Sheriff Court of Ross-shire between that factor and the defender, the latter, in reference to the subject-matter at issue, stated that 'probably 'your Lordship had not seen any thing more indecent than this

'agency on behalf of Smith, undertaken by the very man whose 'duty it was, as the petitioner's (defender's) factor, in the first 'place, to prevent the peculations of Smith, and, in the next 'place, to aid the petitioner in obtaining redress against that per- 'son's malversations.'

The pursuer did not allege malice, but concluded that, on account of these proceedings, the defender was liable to him in damages. The defender, on the other hand, raised an action of count and reckoning against him in relation to the meal transactions, which was conjoined with that at the instance of the pursuer.

In defence against the action of damages, the defender stated that the pursuer had acted as his servant, and was accountable to him; that he had been credibly informed, and had ascertained, that he was defrauding him, and he therefore maintained these pleas:—

1. That when a master suspects that his servant has defrauded him, and gives information to a Magistrate or Justice of the Peace, who makes an investigation into the circumstances, such a proceeding is no relevant ground for an action of damages at the instance of the servant against the master, he having an interest to make the investigation, having proceeded on information given him by a third party, and it not being alleged that he was actuated by malice.

2. That where a charge of fraud made by a master against a servant is true, the former is not liable in damages for having made it.

3. That the expressions made use of in the letter by the defender's agent were not actionable; and, at all events, he could not be liable for expressions which he did not authorize; and,

4. That as the statements made in the process before the Sheriff of Ross-shire were pertinent to the issue, and rested on probable grounds, they could form no relevant cause of action.

On the other hand, it was contended by the pursuer,

1. That the proceedings before the Justices of the Peace were irregular and unwarrantable, and could not be characterized as a proper judicial process, or entitled to the privileges of it, and he was therefore entitled to any damage which he might thereby have sustained; and,

2. That as the allegations of fraud were entirely destitute of truth, he was entitled to reparation for these expressions, which had been authorized and sanctioned by the defender.

The Lord Ordinary found, 'that it not being alleged that the 'defender Sir Hugh Innes was, in his application to the Justices 'of the Peace respecting the pursuer, actuated by malice, those

'proceedings cannot, in consequence of the relation of master and 'servant which subsisted between the parties, be made the ground 'of an action of damages;' that the defender cannot be made re- 'sponsible for the unauthorized expressions alleged to have been 'employed by his agent in a letter sent to a third party, and with 'the writing and sending of which it is not averred that he had 'any connexion whatsoever; that the other expressions conde- 'scended on, and alleged to have been used in the written plead- 'ings of a judicial proceeding, being made on probable grounds, 'and pertinent to the issue of the matter then in dependence, 'cannot be sustained as affording relevant grounds for an action 'of damages;' and therefore assoilzied the defender, with expenses.

The pursuer having reclaimed, the Court declined to hear his counsel, and called upon the counsel for the defender to support the interlocutor, and thereafter recalled it, and remitted to the Lord Ordinary 'to proceed in the action at the instance of Sir 'Hugh Innes against James Smith, and to sist process in the ac- 'tion at James Smith's instance against Sir Hugh Innes, till the 'previous action is discussed and brought to an issue;' and found the pursuer entitled to the expenses hitherto incurred.

The Judges were unanimously of opinion, that the rule on which the defender rested in relation to proceedings adopted by a master against a servant, did not apply to this case, because he was not entitled to act in the manner in which he had done, by going to a Justice of the Peace, making mere verbal charges,—collecting together witnesses without any warrant,—taking their depositions, and refusing to allow the party accused to be present. They were therefore disposed at first to remit the case forthwith to the Jury Court; but as it appeared that the action of count and reckoning had been finally conjoined with that of damages, and that it would be expedient to ascertain whether there was any balance due by the pursuer to the defender, which might have a considerable influence on the quantum of damages, they remitted to the Lord Ordinary to discuss that question in the first place. Their Lordships, however, did not deliver any opinion on the other two points contained in the interlocutor of the Lord Ordinary.

Defender's Authorities.—(1.)—Dundas, Dec. 28. 1727, (13922); Forteith, Nov. 18. 1819, (F. C.); Davidson, May 12. 1821, (ante, Vol. I. No. 2.) 3. Camp. Rep. 293; 4. Esp. 191.—(2.)—M'Donald, June 2. 1813, (F. C.)—(3.)—1. Camp. 267.

J. J. Fraser, W. S.—Cuningham and Bell, W. S.—Agents.

T. M'KENZIE, Suspender.—*Jameson.* No. 219.
R. NOBLE, Charger.—*Skene.*

Bill of Exchange—Prescription.—Plea of prescription of bill of exchange barred by letter after six years importing an acknowledgment.

Feb. 15. 1827.
2D DIVISION.
Bill-Chamber.
Lord Newton.
F.

NOBLE, the charger, held a bill for £50 from the suspender's father, dated in November 1813. In January 1816 the suspender gave his father a promissory note for £200, which the father indorsed to Noble, to the extent of £100, in security of the £50 bill; and in November 1820 the suspender granted a letter to Noble in these terms:—'I promise to pay you by instalments, 'as soon as I am able, the sum of £50, which my father owes 'you, and for which you hold my father's bill and mine.' Founding on this letter and the £200 bill, Noble raised an action against the suspender before the Sheriff of Inverness for payment of the £50, in which he obtained decree. A bill of suspension was then presented without caution, on the ground chiefly that the bill for £200 was prescribed, and that the letter of 1820, being within the six years, did not obviate the plea of limitation; and further, that as the promise to pay the £50 was only as soon as the suspender 'should be able,' it could not be enforced, he being in worse circumstances than when it was granted. The answer was, That the suspender had acknowledged the debt by payments of interest on the £200 bill, marked on it in November 1820, and by a letter to the charger, written in January 1826, offering to pay a composition of £12 for the whole debt; and that the only test of ability to pay was ultimate diligence.

The Lord Ordinary refused the bill, and the Court, in respect of the letter in January 1826, unanimously adhered.

MACK and WOTHERSPOON, W. S.—J. ARNOTT, W. S.—Agents.

Rev. D. SCOT, Pursuer.—*Sol.-Gen. Hope—Jameson.* No. 220.
W. R. RAMSAY, Defender.—*D. of F. Moncreiff—Gibson-Craig—Speirs.*

Prescription—Glebe.—The possession by a proprietor of a barony for upwards of forty years of a piece of ground, formerly the grass glebe of the minister of the parish, but situated in the centre of the barony, under an agreement by the presbytery to grant a feu, but without any feu having been granted, held not sufficient to establish a prescriptive right thereto.

Feb. 15. 1827.
2D DIVISION.
Lord Medwyn.
F.

IN the parish of Corstorphine, besides the glebe and churchyard adjoining the church and manse, there was, at about two miles distance, and which was situated in the centre of and entirely surrounded by the barony of Gogar, which had originally belonged

to one of the prebends of the provostry of Corstorphine, and had been appointed as a grass glebe to the minister of Corstorphine, another glebe of four acres in extent, with a church-yard. In 1748 Sir Robert Myrton, then proprietor of the barony, made an application for the purchase of this glebe and church-yard to the presbytery of Edinburgh, who, after appointing a committee to commune with him on the subject, agreed that they should give him a feu at an annual feu-duty of £4, (being the then rent of the glebe,) and that the feu-right should contain all the ordinary clauses in such rights. They further appointed the committee to get the feu-right drawn out and executed by the minister of Corstorphine, and they empowered the moderator to sign the same in their name. No feu-right, however, was executed; but Sir Robert entered into possession, and regularly paid the stipulated feu-duty to the several incumbents during his life. On his death he was succeeded in the barony of Gogar by David Cunninghame, who in 1790 conveyed it to Ramsay, the defender's grandfather, and in the disposition the glebe and church-yard were nominatim disponed as 'the glebe and church-yard feued by the presbytery 'of Edinburgh to the said Sir Robert Myrton.' Infeftment followed on this disposition, and the possession of the glebe was continued as formerly; but the present pursuer having been inducted to the living of Corstorphine in 1814, he refused to accept the stipulated feu-duty, and in 1825 he raised this action, concluding for reduction of Ramsay's titles—for his removal from the lands—for payment of the rents of the glebe since 1814—and also to have it declared that the pursuer and his successors in the cure had the only good and undoubted right to the glebe in question.

The defences were,

1. That the glebe being locally situated within the barony of Gogar, and having in all likelihood originally formed part of that barony, the titles to the barony were a sufficient ground on which to found a prescriptive possession; and that there having been a possession for 40 years, it was protected by the infeftment of the defender's authors in that barony.

2. That as a glebe is possessed without a feudal title, a conveyance not feudal is sufficient to found a title to prescribe in a third party; and,

3. That this glebe having been appointed to the minister as a grass glebe, an exchange of that for an annual sum equal to the legal money allowance in lieu of a grass glebe, sanctioned by the presbytery, could not afterwards be challenged, on the same principle that a grass glebe cannot be demanded where the statutory allowance has been accepted under sanction of the presbytery.

The Lord Ordinary repelled the defences, and the Court adhered.

Lord Justice-Clerk.—I am ready to admit the hardship of this case, but I must lay that out of view. It is clear that there was not on the face of any document a real infeftment in this piece of ground till 1790. Then, when we go back to the origin of the possession, we see there is an acknowledgment that it was no part of the barony, for Sir Robert Myrton proposes to purchase it as a glebe which had belonged to the provostry of Corstorphine; and, as observed by the Lord Ordinary in his note, it appears from Keith's Catalogue that Gogar was a parsonage at the time of the Reformation. Now, the presbytery had no right to grant a feu; though, if they had done so, and infeftment had followed with a prescriptive possession, it never could have been challenged, as was found in the case of Falkland. But the presbytery never granted any document on which infeftment could be taken. Sir Robert entered into possession, no doubt, but the possession was without any title till 1790; and, in the conveyance then granted, it is expresly said to have been feued by the presbytery, which excludes the notion of its being part of the barony, though it may be locally situated within it, as to which we have no sufficient evidence. I cannot, therefore, refuse the minister's claim now; for, if the ground in question is to be held to have been possessed as part of the barony, the minister would not even have a claim for the £4.

Lord Pitmilly.—I am of the same opinion. Ramsay's plea can only be one of prescription on the old titles. He cannot found it on the contract as a title, or on the disposition 1790, as forty years have not run; he must therefore make it out on the old titles. But he has not proved the glebe to have been originally part of the barony; and although he had, the possession rested on the bargain with the presbytery, which was utterly inconsistent with the notion of its being part of the barony. This is not at all the same with the case of Stonykirk.

Lord Alloway.—I entirely concur. There was no title on which prescription could run. The glebe was so at the Reformation, and we do not see the date of the barony; but at any rate the defender's own titles set forth the glebe as a separate tenement, and he cannot maintain the plea that it was part of the barony. The case of Stonykirk does not at all apply. There was in that case a designation of part of the estate of Ardwall, but it had never been carried into effect. The ground had never been possessed by the minister, and continued always to be possessed as part of the estate of Ardwall.

Lord Glenlee.—It is plain that the conveyance in 1790 is out of the question, as is also the attempt to apply the possession to the old titles; for, by the defender's own statement, it was not actually possessed as part of the barony. But the matter does not appear to me

to be completely sifted to the bottom. I am not satisfied that infeftment was necessary to found a title for prescriptive possession, as this was an allodial, not a feudal property. If an allodial proprietor assign his right, and the buyer possess, is not that enough? The only way in which this is made out to be a glebe is, that it was assigned by decree of locality; but the Court of Teinds had no right to assign it. It may have been part of the barony, and what right had the Teind Court to give it to the minister as a grass glebe? And if this be challengeable, it will be enough to support the defender's right.

Defender's Authorities.—(1.)—2. Ersk. 1. 30; Minister of Stonykirk, June 10. 1724, (10819.)—(2.)—3. Ersk. 7. 3; 2. Stair, 12. 8.—(3.)—1663, c. 21; D. of Argyll, July 9. 1807, (F. C.)

MURRAY and INGLIS, W. S.—GIBSON-CRAIGS and WARDLAW, W. S. —Agents.

No. 221. J. MACLEMAN, Pursuer and Suspender.—*Jeffrey—A. M'Neill.*
D. CAMERON, Defender and Charger.—*Skene—Anderson.*

Process—6. *Geo. IV. c.* 120.—*A. S. Nov.* 12. 1825, § 69.—*Expenses.*—The nominal raiser of a multiplepoinding having allowed decree of consignation to pass against him in absence, and diligence to be raised on it, and having brought a suspension, and the charger not having lodged answers to the reasons—Held,—1.—That although the charger had failed to do so, yet, in the circumstances, he was not liable in expenses of process;—but,—2.—That the raiser was liable in those incurred relative to the opening up of the decree.

Feb. 16. 1827.

1ST DIVISION. Lord Meadowbank. S.

A summons of multiplepoinding having been raised by Cameron in name of Macleman, which was duly intimated to him in terms of the Act of Sederunt, he failed to appear; and being held as confessed, and decree of consignation having been pronounced and extracted, a charge was given to him, of which he presented a bill of suspension, which was passed. The letters having been expede, Cameron, conceiving it unnecessary to lodge answers, did not do so, as he did not mean to oppose the decreet being suspended, but merely to insist for the previous expenses. The suspension was then remitted to Lord Meadowbank ob contingentiam of the multiplepoinding which depended before him; and Macleman thereupon moved that, in respect of no answers, the letters should be suspended simpliciter, and expenses found due. Accordingly his Lordship suspended them, and found Cameron liable in the whole expenses of the suspension, appointed answers to be lodged to a condescendence in the multiplepoinding, and at the same time Macleman having proposed to lodge objections to the competency of the multiplepoinding, he refused to receive

them, except on payment of the previous expenses of that process. Both parties having reclaimed, Cameron lodged answers, and contended,

1. That as it was only in the case of a party 'resisting' a suspension, as provided by § 48th of the Judicature Act, that it was requisite to return answers to the reasons of suspension, and as he did not intend to resist the letters being suspended, it was not necessary for him to lodge answers, and therefore he ought not to have been subjected in the expenses of the suspension; and,

2. That, on the contrary, as the suspension was equivalent to a note to be reponed, and as this would not have been granted to Macleman without payment of the previous expenses, he ought to be found liable in them.

To this it was answered,

1. That the provision of the 69th section of the Act of Sederunt, 12th November 1825, was imperative, 'that when letters of 'suspension have been called, or are given out to see, answers 'shall be returned, as defences in the case of ordinary actions;' and as it was further provided that, when defences were not returned, decree of absolvitor, with expenses, should be pronounced, Cameron must of necessity be found liable in them; and,

2. That such being the case, Macleman could not at the same time be found liable in expenses.

The Court 'conjoined the two processes, recalled the interlocu-'tor in the said multiplepoinding reclaimed against by Daniel 'Cameron, altered the interlocutor reclaimed against in the pro-'cess of suspension, and recalled the same in so far as it finds the 'charger liable in expenses; found the said John Macleman liable 'in the expenses incurred by his failing to appear, and allowing 'a decreet in absence to pass and be extracted and put into exe-'cution against him, and applying by suspension to be reponed 'thereagainst, as well as the subsequent expenses incurred by 'the said Daniel Cameron in said actions;' and remitted to the Lord Ordinary to proceed in the cause.

Lord Gillies.—Cameron ought to have answered the suspension in terms of the Act of Sederunt. It is not sufficient to say that he considered this unnecessary, because the act is imperative, and he ought to have explained that he did not intend to oppose the suspension.

Lord Craigie.—If it were a statutory regulation, we might perhaps be compelled to find Cameron liable in expenses; but it is not so.

Lord Gillies.—We cannot disregard our own Act of Sederunt, without throwing every thing loose.

Lord President.—If it order defences or answers to as supension,

and I find it unnecessary to lodge them, am I to be compelled, under the pain of expenses, to do so? Besides, the act of Parliament says that answers are to be lodged only in the case of 'the party resisting the suspension.' Cameron therefore cannot be subjected in expenses, but Macleman must be so in so far as regards the suspension.

LORD BALGRAY concurred.

L. MACKINTOSH,—W. M'KENZIE, W. S.—Agents.

No. 222.

A. MARJORIBANKS Junior, Suspender.—*Jameson.*
T. HOULDSWORTH and Others, Chargers.—*Rutherfurd.*

Feb. 16. 1827.
1ST DIVISION.
Bill-Chamber.
Lord Newton.
D.

THIS was a question as to passing a bill of suspension. The Lord Ordinary refused it, both in respect of no caution, and on the merits; but the Court altered, and passed simpliciter.

A. DONALD, W. S.—A. C. HOWDEN, W. S.—Agents.

No. 223.

J. M'NAIR.—*Fullerton—Brown.*
R. M'NAIR and R. BRUNTON.—*Rutherfurd—Gibson-Craig.*

Competing.

Heritable Security.—1.—A bond with a double holding, and infeftment following, preferred to a prior bond with a public holding, the infeftment on which was unconfirmed;—and,—2.—A bond granted in security of two bills specifically narrated, not vacated in consequence of these individual bills having been retired by subsequent renewals, the debt remaining undischarged.

Feb. 16. 1827.
2D DIVISION.
Lord Mackenzie.
M'K.

MR. M'NAIR, merchant in Glasgow, in security of a loan of £2000, granted to James M'Nair an heritable bond over a property held by him in feu under a subject superior for payment of a penny Scots feu-duty. In the obligation to infeft contained in this bond, Mr. M'Nair bound himself 'to infeft and seise the 'said James M'Nair, &c. in the respective subjects before de-'scribed, to be holden in the same manner, and for payment of 'the like feu-duties, that I hold or may hold the same, and that 'either by charters of resignation or confirmation, or both, the 'one being always without prejudice to the other.' The precept was in these words:—'I hereby require you and each of 'you, jointly and severally, my bailies in that part hereby spe-'cially constituted, that on sight hereof ye pass, &c. and there 'give and deliver heritable state and sasine,' &c. Infeftment was taken on this bond on the 19th of October 1819, and duly recorded; but no confirmation was obtained.

Subsequently to this, Mr. M'Nair had been accommodated by Robert M'Nair and Brunton with two acceptances of £2000 each, —the one dated 28th October 1819, and the other 1st July 1820,— which were discounted with the Royal Bank; and on the 9th August 1820 he granted to them over the same property an heritable bond of relief for the sum 'contained in the said two bills 'or promissory notes,' which were specially mentioned in the bond. This bond contained a double manner of holding a me vel de me, and infeftment was immediately taken on it, and the infeftment recorded.

Mr. M'Nair's estates having been subsequently sequestrated, the lands over which these securities were granted were sold by the trustee, who brought a multiplepoinding as to the disposal of the price. In this process claims of preference were lodged for James M'Nair, and for Messrs. Robert M'Nair and Brunton.

To the claim of the former it was objected, that his bond could only authorize a public holding; and that there having been no confirmation obtained prior to the infeftment on the second bond, it must be postponed to that bond; while to the claim for Messrs. M'Nair and Brunton it was objected by James M'Nair, that the specific bills for which the bond in security was granted had been duly retired, whereby the bond had been vacated, on the principles of the decision in the case of the Bank of Scotland *v.* the Bank of England, (14121); and although it was alleged that they had been merely retired by renewals which were still unpaid, he contended that there was no sufficient evidence that the bills now said to constitute the debt were really renewals of the specific bills for which the security was granted. The Lord Ordinary and the Court, however, being satisfied that these were truly renewals of the original bills, and being clearly of opinion that James M'Nair's security authorized only a public holding, and was consequently subject to the same objection which occurred in the cases of Rowand *v.* Campbell, (ante, Vol. III. No. 141,) and Struthers *v.* Lang, (ante, Vol. IV. No. 281,) preferred Messrs Robert M'Nair and Brunton to the fund in medio.

J. and W. Jollie, W. S.—Gibson-Craigs and Wardlaw, W. S.—Agents.

No. 224. HARROWAR'S TRUSTEES, Pursuers.—*More.*
COUPER'S TRUSTEES, Defenders.—*Fullerton—Brownlee.*

Adjudication.—No ground for staying intimation of a first adjudication, that the debtor had executed a trust-deed of all his heritable property for behoof of his creditors, on which the trustees had taken infeftment.

Feb. 16. 1827.

2D DIVISION. Lord Mackenzie.

LORD MACKENZIE reported this case, which was a first adjudication led at the instance of Harrowar's trustees against Couper, in reference to an objection taken to the usual motion for intimation.

Couper had executed a trust-deed of his whole heritable property for behoof of his creditors; but to this Harrowar's trustees, who were creditors, declined to accede, and they raised a summons of adjudication against Couper, to which his trustees, who had been duly infeft on the trust-deed in their favour, put in defences, stating that as Mr. Couper was completely divested by the trust-deed, it was incompetent for any of his creditors to proceed by adjudication against him without setting aside the trust-deed, and infeftment following on it, which was not attempted; and on this ground they opposed the motion for intimation. On the other hand it was contended for Harrowar's trustees, that the existence of the trust-conveyance was no bar to an adjudication, which would at least carry the reversionary interest; but at all events that this was a plea on the merits, which could not, under the new forms, be discussed till the record was closed, and that it was impossible to allow intimation to be delayed till then.

The Court, being unanimously of opinion that there were no grounds for staying intimation, directed his Lordship to pronounce an order accordingly.

LORD GLENLEE.—I understand that intimation cannot be stopped, unless the defender can show instanter that there are no grounds for adjudging, as if he produce a discharge of the debt. It is perfectly settled, however, that the existence of a trust-deed is no objection to a non-acceding creditor adjudging. It may, no doubt, be to little purpose; but, as the truster is not divested of the beneficial interest, a creditor may adjudge for the reversion; and so, although originally the first adjudication was held to denude the debtor, it was never imagined that this precluded a second, or any number of subsequent adjudications.

The other Judges concurred, observing that the case of Tait, quoted for the defenders, had no application here.

Defenders' Authority.—Queensberry Executors *v.* Tait, July 11. 1817, (F. C.)

CAMPBELL and MACK, W. S.—T. MEGGET, W. S.—Agents.

MAGISTRATES of LAUDER, Pursuers, Advocators, and Chargers. —*Skene—M'Neill.* No. 225.

A. SPENCE and Others, Defenders, Respondents, and Suspenders. —*D. of F. Moncreiff—Christison.*

Et è contra.

THE Court adhered to an interlocutor of the Lord Ordinary finding no expenses due to either party in various conjoined mutual processes of declarator, advocation, and suspension between the Magistrates and certain burgesses of Lauder.

Feb. 16. 1827.

2D DIVISION. Lord Mackenzie. B.

W. RENNY, W. S.—TOD and ROMANES, W. S.—Agents.

SEA INSURANCE COMPANY of SCOTLAND, W. BRAIDWOOD, their Manager, and Others, Suspenders.—*Rutherfurd.* No. 226.

J. GAVIN and Others, Chargers.—*Forsyth—Neaves.*

Title to Sue and be Sued—Society.—The Court sustained a libel and charge directed against an Insurance Company not incorporated by charter, and against the manager and certain individual directors who had subscribed the policy of insurance on which the action was brought.

GAVIN and others, owners of the brigantine Sarah of Leith, which had been wrecked in the bay of Saloe in Spain, raised a summons or precept in the Court of Admiralty, setting forth that by 'policy of insurance, bearing date the 17th August 1821 'years, made and granted by the Sea Insurance Company of 'Scotland, and underwritten or subscribed by Robert Gordon, 'George Mylne, and Colin M'Nab, three of the ordinary direc-'tors of and for the said Sea Insurance Company of Scotland, 'to and in favour of the said John Gavin &c., he the said John 'Gavin did make assurance,' &c. The libel then, after detailing the particulars of the shipwreck of the vessel, proceeded to subsume, 'That a total loss has been sustained by the pur-'suers of the said brigantine or vessel, the Sarah, her furni-'ture and materials; and the said Sea Insurance Company, ma-'nagers, directors, and partners thereof, are liable in indemni-'fication to the pursuers of said loss, in terms and by virtue of 'the aforesaid policy, to the amount of the foresaid sum of £1200 'sterling underwritten thereon by them as aforesaid: And although 'the pursuers have frequently desired and required the said Sea 'Insurance Company, and William Braidwood, their manager, 'and a partner thereof, and the said Robert Gordon, George 'Mylne, and Colin M'Nab, who subscribe the said policy, to

Feb. 17. 1827.

2D DIVISION. Admiralty. F.

'make payment to them of the foresaid sum, and interest thereof, 'but under deduction as after mentioned, yet they refuse,' &c. The conclusion then followed thus:—'Therefore the said Sea 'Insurance Company of Scotland, the said William Braidwood, 'Robert Gordon, George Mylne, and Colin M'Nab, ought and 'should be decerned and ordained, by decree of the Judge of 'our said High Court of Admiralty, to make payment to the 'pursuers of the aforesaid sum of £1200 sterling,' &c.

Defences against this action were lodged in name of 'The Sea 'Insurance Company of Scotland, and William Braidwood junior, 'their manager;' and, after considerable litigation in the Court of Admiralty, decree was pronounced in terms of the summons, and horning was executed thereon in similar terms, the messenger's execution being as follows:—'A full double to the will, with a 'just copy of charge to the effect foresaid thereto subjoined, I 'left for the Sea Insurance Company of Scotland, as a company, 'in the hands of a clerk within their counting-room in Hunter 'square, Edinburgh, for their behoof; the like double and copy 'of charge I delivered to the said William Braidwood, personally 'apprehended; and the like double and copy of charge I left for 'each of the said Robert Gordon, George Mylne, and Colin 'M'Nab, in the hands of a clerk within the said insurance office 'aforesaid,' &c.

Of the horning thus executed, a suspension was brought in the name of 'The Sea Insurance Company of Scotland, and William 'Braidwood, manager of the said company, and Robert Gordon, 'George Mylne, and Colin M'Nab, directors.'

After some procedure had taken place in discussing the merits of the cause, a doubt was started, in consequence of certain difficulties said to have been entertained in the House of Lords in regard to cases then depending with the Commercial Banking Company and the Glasgow Bank, how far the suspenders, not being a corporate society, could sue or be sued under their denomination of the Sea Insurance Company, or through their office-bearers; and the Court, considering this objection to be pars judicis, after delaying the cause for some time in expectation of a judgment by the House of Lords in the actions now alluded to, ordered Cases on the point.

In these Cases the suspenders argued,

1. That no self-constituted society could sue as a corporate body, either by its name or through its office-bearers, as had frequently been decided in the case of mason lodges and similar associations; and that although a mercantile company might sue by its proper firm, whereby it subscribed its obligations, it had been settled in

the case of the Culcreuch Cotton Company that it could not sue by a mere name or designation; and accordingly, as the liability to be sued was co-ordinate with the privilege of suing, the precept and charge in this case were incompetent; and,

2. That the objection was not removed by the introduction of the names of individual directors, because they were not sued in this case as individuals, but solely in their character of office-bearers of a self-constituted society; and being so called, a persona standi could not (agreeably to the principles of the decision in the case of Wilson *v.* Kippen) be given them by the circumstance of their having an individual interest, in respect of which no action was brought against them, and in which character they had not entered appearance.

On the other hand, the chargers, besides contending that the objection could only go to the dismissal of the suspension as incompetently brought, maintained,

1. That although self-constituted associations for trifling or special purposes were not capable of suing or being sued, yet, by the law of Scotland, societies for the purposes of trade had always been allowed this privilege, however numerous their partners might be; that such partnerships were undoubtedly entitled to sue under their social firm, and that there was no real distinction between what was called a firm, (the names in which were frequently of persons no longer partners, and perhaps long since dead,) and a mere denomination; and as to the case of Culcreuch, that the objection there was obviated in the present case in consequence of there being individual partners or directors named, against whom diligence might proceed; and,

2. That, at all events, the conclusions in the precept against the individuals who had themselves subscribed the policy on which the action was founded, was sufficient to support the action, they being personally responsible for the whole obligations of the company undertaken in their names.

The Court repelled 'the objection to the competency of the 'libel and charge,' and ordered the cause to the roll for judgment on the merits.*

Lord Justice-Clerk.—We were not anxious to stir this question; but we had our attention called to it by the proceedings in the House of Lords in the cases of the Commercial Bank and manager, and the Glasgow Bank and manager. These remained for the consideration of the House of Lords, and it was therefore proper for us

* See infra, March 3.

to pause; but as there is no likelihood of a speedy decision of these cases by the House of Lords, and as the chargers have been met in a new action by the plea of lis alibi pendens, we must dispose of the question. It is no doubt attended with considerable difficulty, and I certainly was anxious, if possible, to get over the difficulty. I am satisfied, however, that the case of the Culcreuch Cotton Company was rightly decided. There is a complete distinction between proper firms, consisting of the names of partners with the company, by which the obligations of the company are subscribed, and a mere descriptive denomination. I have no doubt of the right of a company to sue and defend under such proper firms as Sir William Forbes and Company, who, by the way, do not sign *Sir* William Forbes and Company, but William Forbes and Co. Firms are very different from names. What, then, is the case here? The summons states the policy to have been entered into by the Sea Insurance Company, and the individuals named are set forth as managers and directors thereof; and we are not entitled to say that the conclusion against them is against them merely as individuals who had signed a policy. It is against them in the capacity already set forth in the summons. We cannot throw out of view that the action is truly against the Sea Insurance Company. The action brought is not against the individuals; and the question here at issue is, not whether an action might not lie against these parties as individual partners of this company who had signed a policy, but whether an action can be brought against the company by calling their office-bearers as such? And it brings out, therefore, the point decided in the case of the Culcreuch Cotton Company. There is here, as in that case, just a name, with this difference, that a manager and directors are added, not as individuals, but as managers of a self-constituted company. This, however, does not cure the defect. I do not lay much stress on the case of mason lodges, though in these cases also, as here, we had individuals as managers added to the body.

Lord Pitmilly.—There are two points for consideration here:—1. Where there is a mere descriptive designation of a company, and nothing more, I must hold myself bound by the decision in the case of the Culcreuch Cotton Company; and although I think that decision right, still it was a new decision; but it was right for this reason, that I do not see how diligence is to be done against a company called merely by its designation. But I must hold, for any thing I have seen, that that was the first case of the kind; and although there is a wide distinction between a case of that kind and one where a proper firm is used, still many actions were received by the Court pursued by companies under such designations, as the numerous actions at the instance of the York Buildings Company. Yet the case of the Culcreuch Cotton Company is rightly decided, and I would follow it as to the Sea Insurance Company, if they had been called under that name alone, without any individual partners. 2. But

it comes to be different when you have names in addition. If we had names alone, would the action not be good? and can the circumstance of The Sea Insurance Company being added to the names make it worse? I cannot distinguish between this case and that of Sir William Forbes, James Hunter, and Company, as these are names of parties not now alive. A name like this with individuals is not so much of the nature of a mere designation as a firm is; and if action can be sustained in the one case, I think it may also in the other, although I certainly have great doubts, and give my opinion with much hesitation.

Lord Alloway.—This is a question of great difficulty and importance. All the decisions quoted by the suspenders are well decided, but none of them rules the present; and we must therefore go to general principles. Lord Pitmilly has alluded to the York Buildings Company. That company, no doubt, was erected by act of Parliament, but only for raising water in the York Buildings, and not for buying land in Scotland; so that, in regard to questions arising out of these purchases, suits at their instance by their company name could not be authorized by the act; yet no objection was ever taken to those suits which they pursued by the company, and an individual name as governor. The remark of Lord Bankton on the case of the Lanark Mason Lodge explains the principle on which such cases were decided—that a private society is not entitled to make regulations binding on its members. It is a sound observation by the chargers, that there is no real distinction between mercantile companies, with partners to any extent, suing by any name, as well as by that of parties who do not exist, or, as it sometimes happens, by fictitious names, such as Goodluck and Company, Hazard and Company, &c. If individuals are held out who may be prosecuted and may prosecute on contracts entered into by them, that is enough. I know of no precedent in Scotland to stop a process of this kind, and I see no ground for introducing a new law. Is there any difference between such names with partners, and a firm? I can see none. There is another equally important point. What could prevent the Judge-Admiral from pronouncing judgment against the four individuals against whom horning has been raised? Even take the case of a mason lodge entering into a contract by four office-bearers, say for building a lodge: Could not the tradesman bring his action against the lodge and the four individuals? I conceive that he could. Such is the opinion I have formed, although I should have wished to have had more time, as I only got one of the papers last night. I may add, that from the English cases quoted, it appears that whether the company be good or bad, even bubble companies, parties taking the management, or being partners, are liable to fulfil all the obligations of the company.

Lord Glenlee.—As to the two cases in the House of Lords, we do not know what was the form of the summons, and so can say nothing

about them. But besides, I have great doubts of founding any thing, in deciding a case before us, on what we hear extrajudicially has passed in the House of Lords. Till the decision by that House, we must decide here as if no such proceedings had taken place; and I do think, according to the practice of Scotland, that the original summons in this case was a sufficient libel. As to descriptive names, they are not so different from firms as is supposed. The case of the Culcreuch Company was not the first case where action was refused on a descriptive title without any individual instance; and as to defending, I cannot well see how a company so named is to be cited. I refused, as Ordinary, many years ago to sustain such an action at the instance of the Muirkirk Iron Company; but that has no application to the present case. Whatever the narrative of the summons here may be, the conclusions are not against the Sea Insurance Company and the individuals *as directors*, but they are laid against them *as individuals*. The decree, no doubt, bears also the Sea Insurance Company; but supposing there had been no such company, the individuals would be liable directly and individually. If they choose to present a bill of suspension as the Sea Insurance Company, how can they come forward and say they have a persona in that character to the effect of suspending, and not a persona to the effect of decree going against them?

Rutherfurd.—The opinion of the majority of the Court being that the instance of the suspenders is good, I submit that there should be a finding sustaining their title as suspenders in this suspension, by which means alone the Court can judge of the original summons and decree.

Lord Glenlee.—I do not see that we are called upon to sustain the title as set forth in the suspension. It appears to me that the proper interlocutor will be, to repel the objections to the competency of the libel and charge.

In this suggestion Lords Pitmilly and Alloway concurred.

Suspenders' Authorities.—(1.)—Mason Lodge of Lanark, June 11. 1730, (14554); Crawford and Mitchell, June 13. 1761, (1958); Lawson, July 7. 1810, (F. C.); Culcreuch Cotton Company, Nov. 27. 1822, (ante, Vol. II. No. 46.)—(2.)—Wilson &c. *v.* Kippen &c. June 7. 1823, (ante, Vol. II. No. 359.)

Chargers' Authorities.—Thomson, July 2. 1812, (F. C.); Carter *v.* Drury, (Vesey and Beames, 154.)

Inglis and Weir, W. S.—W. Smith,—Agents.

J. OSWALD and A. WADDELL, Pursuers.—*Sol.-Gen. Hope—Fullerton.*
J. LAWRIE and Others, Defenders.—*D. of F. Moncreiff—Ivory.*

No. 227.

Title to Pursue—Road.—Action for the removal of obstructions erected across a road, alleged to be a public road, sustained at the instance of two proprietors in the parish designing themselves by their estates, and as 'two and a committee of the trustees for the parish, &c. under the Statute Labour Act for the 'county,' &c.

Feb. 17. 1827.

2D DIVISION. Lord Mackenzie. B.

BY the Statute Labour Act of the county of Lanark, all persons qualified by the possession of a certain extent of land are declared to be trustees, and certain powers are given to parish trustees, who are directed to hold annual meetings within their own parish. In particular it is declared that the parish trustees 'shall super-'intend and have the direction and management of the several 'roads, bridges, fords, and ferries within their respective parishes;' and that if any person shall erect a building within a certain distance of the centre of the road, 'it shall be lawful for the parish 'trustees to order the said buildings to be removed,' &c.; but the act contains no provision as to the persons in whose names suits may be brought or defended. For the purpose of removing gates which had been placed at the ends of a street or road in the parish of Govan, on the south bank of the Clyde, near the city of Glasgow, and of having it declared a public road, an action was raised at the instance of 'James Oswald, Esq. of Shieldhall, and Alex-'ander Waddell, Esq. of Stonefield, two and a committee of the 'trustees for the parish of Govan under the Statute Labour Act 'for the county of Lanark.' An objection having been taken to their title and instance as thus set forth, the Lord Ordinary appointed them to give in a minute, stating in what character they insisted. A minute was accordingly lodged, in which they stated, 'That they pursue the present action in two characters: 1. As a 'committee for the parish of Govan of the trustees under the Sta-'tute Labour Act; 2. As individual proprietors within the parish 'of Govan, who apprehend they have an interest to remove ob-'structions from the highways and public roads in their neigh-'bourhood.'

Thereupon the defenders contended, in support of their objection to the title and instance,

1. That no power being given by the act of Parliament, delegating to parish trustees the right to sue as an independent body, no action by road trustees as such could be sustained, unless by the aggregate body of trustees for the whole county.

2. That supposing an action could be raised by the trustees of

a parish, it could only be done in name of the trustees, and not by a committee.

3. That the pursuers here had not been appointed a committee with authority to raise the present action; and,

4. That in so far as the action was insisted in by the pursuers for their individual interest, there was no instance set forth as individuals, the action being brought by them as two and a committee of trustees.

For the pursuers, on the other hand, it was pleaded,

1. That certain powers being given to parish trustees by the act of Parliament, they must necessarily have the right of carrying them into effect by following out actions in a Court of Law.

2. That a body entitled to sue might appoint commissioners, in whose name the action might be brought; and that it was the universal custom for trustees under acts, like the Lanark act, providing no special mode of suing, to raise actions in the manner which had been adopted here.

3. That the pursuers had been appointed a committee to see certain previous processes before the Inferior Court, for removing the obstruction complained of, carried on; that the present action was subsidiary to these former measures; and though there was no specific mandate for raising it, subsequent meetings of the parish trustees had expressly approved of it, and authorized the pursuers to proceed in following it out to an issue; and,

4. That the designation of the pursuers by their estates situated in the parish, and as trustees, (a necessary qualification of which character was the possession of land within the parish,) was a sufficient setting forth of their character as individuals to support the action for their individual interest.

The Lord Ordinary having sustained the title, the defenders reclaimed. The Court at first altered the Lord Ordinary's interlocutor, and 'in respect of the defect in the libel,' sustained the objections to the title, and assoilzied; but, on advising a reclaiming petition for the pursuers, with answers, their Lordships returned to the interlocutor of the Lord Ordinary.

Lord Justice-Clerk.—I concurred in the interlocutor reclaimed against when it was pronounced; but I am now satisfied that we ought to alter it, and return to that of the Lord Ordinary; for, on reconsideration, I think we have put a judaical construction on the libel. The pursuers have brought an action as two and a committee of trustees, and taking them merely as individual trustees, we know that it is a necessary qualification that they should possess land in the parish; and although, therefore, we had been of opinion that the parish trustees could not sue by a committee, (which I do not think

is the case, as the decision in Low *v.* Arbuthnot, in the First Division, is an authority in point in favour of their so suing,) yet, as individual trustees, they have a right to bring this action; and I conceive that any trustee may challenge obstructions on roads placed under their charge as guardians to preserve them for the use of the lieges.

Lord Glenlee.—The pursuers, no doubt, cannot maintain under this libel the conclusions as mere individuals; but they are entitled to do so as individual trustees. It is quite unintelligible that the Legislature should give powers without the means of exercising them. Parish trustees may therefore by the statute apply to have obstructions removed, and that was first done here; then this action, authorized by the parish trustees, is just an incidental step to enable them to remove the obstruction they are entitled by statute to do. I am therefore now inclined to alter the interlocutor, in which I formerly concurred, and to sustain the action.

Lord Pitmilly.—I also concurred in the interlocutor reclaimed against, and I am in like manner satisfied that it must be altered.

Lord Alloway.—Having been against the interlocutor when pronounced, I of course concur in altering.

Pursuers' Authorities.—Bow, Dec. 6. 1825, (ante, Vol. IV. No. 207); Low, June 1. 1826, (ante, Vol. IV. No. 399.)

Defenders' Authorities.—Coulter, June 11. 1823, (ante, Vol. II. No. 367); Fleshers of Dumfries, Dec. 10. 1815, (F. C.); Wilson, June 7. 1823, (ante, Vol. II. No. 359.)

D. Fisher,—Gibson-Craigs and Wardlaw, W. S.—Agents.

Lieut. Stewart, Complainer.—*Sol.-Gen. Hope—Keay.*
Earl of Fife and Others, Respondents.—*Thomson—Robinson.*

No. 228.

Freehold Qualification—Sasine.—Held,—1.—That although a disposition containing procuratory and precept, on which sasine is taken, be confirmed by a charter of confirmation and resignation, yet it is still competent to take sasine on the precept in that charter, so as to make up titles by resignation;—2.—That a party who is both disponee and heir of line of a disponer is entitled to be enrolled a freeholder, as heir apparent of the disponer;—but,—3.—That part of the lands claimed on, as affording a freehold qualification, having been omitted in recording the sasine founded on, the claim is ineffectual.

Feb. 20. 1827.

1st Division. Lord Meadowbank. S.

On the 10th of December 1663 Elizabeth Strachan and her four sisters obtained a special service, as heirs-portioners of their grandfather, 'in omnibus et singulis villis et terris de Eistertown 'de Lesmurdie, tertiâ parte terrarum de Inverquherache, tertiâ 'parte terrarum de Auchnastank, et tertiâ parte terrarum de Bel-'chirie, cum earundem pertinen., omnes jacen. infra parochiam 'de Mortliche, et vicecomitatem de Bamff.' The valent clause was in these terms:—'Et quod omnes et singulæ prædictæ terræ, 'aliaque particulariter suprascript., cum pertinen. earundem, valu-

'erunt per annum, tempore pacis, tres libras et decem solidos usualis 'monetæ regni Scotiæ, et nunc valent per annum quatuordecim 'libras monetæ prædictæ.' By these ladies the lands were conveyed to Alexander Stewart, and they were thus described in a charter of resignation which he obtained on the 4th of March 1696: 'Totas et integras terras de Eastertown de Lesmurdie, inibi com- 'prehenden. tertiam partem terrarum de Inverquharachie, tertiam 'partem terrarum de Auchnastank, cum tertia parte terrarum de 'Bellschirrie; molendinum de Lesmurdie, terras molendinarias, 'multuras, sequelas, et lie knaveships earund., terras de Dry- 'wells, Bridgehead, Coldstripe, Tombally, Milntoune; terras 'earund. molendinarias; Oldtree, Succoth, Fortriestack, cum 'domibus,' &c.

In 1726 Alexander Stewart, on the marriage of his son Francis (primus) with Miss Elspeth Gordon, granted a disposition under the contract of marriage in his favour of the above lands, containing procuratory of resignation and precept of sasine, in virtue of which Francis was infeft on the 21st of October of that year. On the 27th February 1747, he obtained, in virtue of the procuratory of resignation, a Crown charter, which, after narrating the act of resignation, contained a confirmation of the disposition in the marriage contract, and sasine thereon, in these terms:—'Et nos ratificavimus, approbavimus, et confirmavimus, 'sicut tenore presentium, cum avisamento et consensu prædict., ra- 'tificamus, approbamus, et confirmamus prædict. contractum ma- 'trimonialem init. inter dict. Franciscum Stewart et Elspetam 'Gordon, cum avisamento et onus suscipien. modo supra men- 'tionat., cum instrumentis sasinæ desuper suscept., in universis 'capitibus, clausulis, tenoribus, et contentis earund., cum omnibus 'desuper secutis vel sequendis: Atque nos volumus et concedi- 'mus, et pro nobis nostrisque regiis successoribus decernimus et 'ordinamus, præsentem hanc generalem confirmationem tam vali- 'dam, efficacem, et sufficientem, similisque roboris et effectûs esse 'ad omnes intentiones et proposita, ac si prædict. contractus ma- 'trimonialis, atq. infeofamenta desuper suscept., in hisce præsent- 'ibus verbatim descripta fuissent, etiamsi id non ita fact. sit.'

In virtue of the precept in this charter, Francis on the 14th of March thereafter took sasine, which was recorded. In the instrument of sasine it was stated, that the charter had been delivered to the notary 'perlegendum, publicandum, et vulgari sermone adstan- 'tibus exponendum,' which he accordingly did, and the clause of delivery bore that sasine was given, 'dict. villæ et terrarum 'de Eastertown de Lesmurdie (inibi comprehenden. tertiam par- 'tem terrarum de Invercharrachy, tertiam partem terrarum de

'Auchnastank, una cum tertia parte terrarum de Belchirrie, mo-'lendinum de Lesmurdie,) terras molendinarias, multuras, se-'quelas, et lie knaveships ejusd.,' &c.; and then the other lands were narrated. The names of the bailie and attorney were filled up by the notary, while the rest of the deed was written in another hand; and in the docquet it was stated that the deed was written 'manu alienâ.' In recording the sasine, the words of the above clause contained within the parenthesis were omitted, so that sasine appeared to have been given only 'dict. villæ et 'terrarum de Eastertown de Lesmurdie,' without any mention of Invercharrachy, Auchnastank, or Belchirrie. The other parts of the record, however, were quite correct; and there was a clause of dispensation in the charter declaring sasine at Lesmurdie sufficient.

Under the above charter and sasine, Francis (primus) was enrolled as a freeholder of the county of Banff on the 29th of September 1749. He had two sons,—Francis (secundus) and William; and in October 1770 he executed a disposition in favour of William 'of all and whole the town and lands of Eastertown 'of Lesmurdy, with the parts and pertinents thereof, compre-'hending therein the mill of Lesmurdy,' &c.; on which sasine was taken in the same terms on the 3d of November of that year, and recorded. Francis (secundus) died without issue, whereby William became the heir of his father, who also soon thereafter died.

William, without making his right public under the disposition of 1770, died, leaving a son, afterwards designed Major-General Francis Stewart King, who was enrolled a freeholder, as apparent heir of his grandfather Francis (primus), but died in apparency, so that the dominium directum still remained in hæreditate jacente of his grandfather. The complainer, who was the eldest son of the General, founding on the charter of 12th February 1747, the sasine thereon, and the retour of the special service of the Misses Strachan, then claimed, as apparent heir of Francis (primus), his great-grandfather, to be enrolled, on occasion of the general election, as a freeholder of the county of Banff. His claim was objected to on various grounds; and it having been rejected by a majority, consisting of Lord Fife and others, he presented a petition and complaint for warrant of enrolment. Against this demand various pleas were maintained; but, in particular,

1. That as the disposition and sasine granted by Alexander Stewart in 1726 had been confirmed by the Crown charter of 1747, he was thereby divested of all feudal connexion with the lands; and as it was only competent for a vassal to execute a resignation, and as he had thereby ceased to be so, neither he nor

any in his right could thereafter execute a resignation; and consequently, as the sasine on which the complainer founded was taken upon the precept contained in the charter of resignation, it was inept, seeing that the charter had been obtained on a resignation made a non habente potestatem; and in support of this objection reliance was placed mainly on the Juridical Styles, 'Heritable Rights,' p. 433, 524.

2. That as the instrument of sasine merely bore that the charter had been read 'adstantibus,' and not 'testibus adstantibus;' and as it appeared ex facie that part of the instrument was in the handwriting of the notary himself, whereas he had stated in the docquet that it was written entirely 'manu alienâ,' it could receive no faith.

3. That the sasine had not been duly recorded, seeing that the greater part of the clause of delivery had been omitted; and besides, as it was necessary to produce a recorded sasine corresponding with the retour as to the lands, and as there was a manifest discrepancy between the recorded sasine and retour founded on, the claim of the complainer was essentially defective; and,

4. That as Francis (primus) had been divested of the lands by the disposition and sasine granted to his son William, and as the disposition contained a procuratory of resignation, whereby there remained only a temporary and defeasible right to the dominium directum in Francis, it was not competent for the complainer to claim to be enrolled as his apparent heir, and as such having right to the lands and superiority.

To this it was answered,

1. That as the objection to the regularity of the title was not apparent ex facie, it was not competent to state it in the Court of Freeholders; but, independent of this, it was in itself unfounded; that the disposition of 1726, as usual, conferred a power to make up titles both by resignation and confirmation, the one without prejudice to the other; that although a title made up in either of these ways might be effectual, yet there was nothing to prevent a party from adopting both ob majorem cautelam, and to take advantage of the one or the other, as he should see proper; and that, accordingly, this had been settled both by the decisions of the Court, and by immemorial practice.

2. That the objections to the sasine were frivolous and unfounded; that one of them had been repelled in the case of Dickson *v.* Syme; and that a notary, when he read his warrant, did so, not merely to the witnesses, but to all and sundry.

3. That the words which had been omitted in the record were unimportant, seeing that the clause was correctly transcribed, so

far as it bore that delivery had been given 'villæ et terrarum de 'Eastertown de Lesmurdy;' and as the other lands were comprehended in, and formed part of Lesmurdy, and sasine there was declared sufficient for the whole, the omission of them was not of any importance; and,

4. That as William was the heir of line of Francis (primus), as well as his disponee, and as the complainer stood in the same situation, and he alone was now the heir apparent of Francis, and could execute the procuratory of resignation, or, if he thought fit, make up a title by special service, the circumstance of being disponee could not prevent him claiming in his other character of heir apparent.

The Lord Ordinary having reported the case, the Court, on the 27th of January 1827, 'repelled the objection to the regular-'ity of the charter as a charter of resignation, and also repelled 'the objection stated to the complainer's right to be enrolled as 'heir apparent of his great-grandfather Francis Stewart; and, 'before answer as to the other objections, appointed the com-'plainer to print the retour and sasine, and the description of the 'lands contained in the charter founded on by him, and allowed 'him to state in a minute whether the lands lie contiguous, or 'otherwise.' He accordingly lodged a minute, in which he stated that they were contiguous, but that there were now no traces of the separate lands of Invercharachy, Auchnastank, or Belcherrie. On the other hand, this was denied, and it was alleged that they were distinct and separate tenements, lying in different parishes.

The Court, on resuming consideration of the case, 'in respect 'of the omission in the record of the sasine founded upon by the 'complainer, dismissed the petition and complaint, and found the 'complainer liable to the respondents in the statutory penalty of '£30, with full expenses of process.'

In regard to the objection to the charter of resignation,

LORD BALGRAY observed:—The objection rests entirely on a mistake in feudal principle. A charter of resignation is the proper feudal mode of making up a title. The superior cannot be compelled to confirm, but he may be obliged to give a charter of resignation. In going to him, the vassal must have a resignation in his hand. If the superior choose to confirm, good and well; but the vassal can nevertheless, if he think fit, insist upon the superior granting a charter of resignation. The vassal may have doubts whether the base infeftment is valid, or he may not wish to trust to it alone; or perhaps he may be anxious not to rely even on the title made up by resignation, and may therefore be desirous to have the titles made up in both ways, the one being always without prejudice of the other; and it is

certainly a new doctrine to say that they are inconsistent and destructive of each other.

LORD PRESIDENT.—I did not think that the objection could be seriously maintained. There is nothing in it.

LORDS CRAIGIE and GILLIES concurred.

On the point as to the recorded sasine,

LORD BALGRAY observed:—We can only look at the recorded sasine, and the question is, Whether it gives the complainer a right to be enrolled in terms of his claim? But, on looking at the recorded sasine, it appears that the complainer is only infeft in Easter Lesmurdy; whereas the retour bears reference not merely to these lands, but to Inverarachy, Auchnastank, and Belchirrie. It is impossible, therefore, to sustain the claim.

LORD GILLIES.—Independently of the circumstance of the sasine not having been duly recorded, it is a sufficient objection that there is a discrepancy between it and the retour.

LORD CRAIGIE was rather disposed to repel the objection.

The LORD PRESIDENT thought that the sasine could not be considered as duly recorded, and therefore that the complainer could not claim in virtue of it.

Complainer's Authorities.—(1.)—2. Ross, 297; Cunningham, Jan. 3. 1754, (Elch. No. 71. M. P.); 5. Brown's Sup. 809; Kibble, June 16. 1814, (F. C.)—(2.)—Dickson, Feb. 24. 1801, (No. 7. App. Tailzie.)—(4.)—Bell, El. Law, 130.

Respondents' Authorities.—(1.)—Russel on Convey. 237; Jurid. St. t. 6. § 2. 433. 524.—(3.)—Gray, Feb. 23. 1790, (8796); Bell, El. Law, 262.

F. STEWART, W. S.—INGLIS and WEIR, W. S.—Agents.

No. 229.

C. SMYTH, Pursuer.—*Sol.-Gen. Hope—W. Bell.*
A. NISBET, Defender.—*Jameson—Moir.*

Attorney License—Stat. 25. Geo. III. c. 80.—7. Geo. IV. c. 44.—The executor of a writer to the signet having obtained decree in absence for certain business accounts, and a reduction having been brought, in the course of which it was alleged that the writer had not taken out his attorney license during the currency of the accounts, whereby he had no right to recover payment—Held competent for the executor, pending the process, to pay the arrears of duties under the above statute, 7. Geo. IV. and thereby remove the objection.

Feb. 20. 1827.

1ST DIVISION. Lord Medwyn. S.

NISBET, as trust-disponee and executor of the late Joseph Cauvin, writer to the signet, obtained in absence two decrees against Smyth, the one in 1818, and the other in 1823, for payment of certain business accounts as due to Cauvin, his agent in actions which had depended in Court. Of these decrees Smyth brought an action of reduction, alleging that the accounts were not due, and at all events were prescribed. A condescendence having been ordered in reference to his grounds of reduction, he there

stated that, during the currency of the accounts, Cauvin had failed to take out his attorney license; and he pleaded, that, in terms of the 25th Geo. III. c. 80, he was incapacitated from recovering payment of them, and therefore the decrees were null. Various answers were made to this objection; but, after the record was closed, the defender, availing himself of the provisions of the statute 7th Geo. IV. c. 44, (which was passed pending the action,) paid the arrears due at the Stamp-office, and then contended that the objection was entirely obviated.

To this it was answered,

1. That the statute could not have a retrospective effect, so as to deprive a party of the benefit of a plea which he had pleaded.

2. That it was only intended to operate in favour of parties who should in future raise actions, and not in favour of those who had done so, and obtained decrees; and,

3. That as it was not alleged in the closed record that payment of the arrears had been made, and no plea in law was founded on the statute, no regard could be paid to the circumstance.

The Lord Ordinary, in the circumstances, repelled the plea of prescription, and found, 'That as it has been found that the 'omission to take out attorney certificates is a sufficient ground 'of suspension, (Robertson against Strachan, 29th June 1826,) 'it must also be a good ground of reduction; but in respect that 'the omission of the late Mr. Cauvin for the year 1814 has been 'supplied by his executor paying for a certificate in his name, 'finds that, in terms of the recent statute 7th Geo. IV. c. 44, this 'sufficiently obviates the objection, and renders it unnecessary to 'decide whether such a ground of reduction would have been 'competent under this summons, which does not state this among 'the reasons of reduction.'

Smyth reclaimed, but the Court adhered.

Lord President.—The objection is one of the nature of a personal bar against pursuing, and it may be doubted whether it is available (being a sort of penalty) against the executor and disponee; but at all events it has been removed.

Lord Balgray.—The late statute was intended to indemnify all who complied with its provisions, which has been here done, so that the objection is entirely swept away.

Lord Craigie was of the same opinion, and that it ought to receive the most favourable construction.

Lord Gillies concurred.

D. Maclean, W. S.—Carnegy and Shepherd, W. S.—Agents.

No. 230. A. BUCHANAN, Collector of Poor's Rates for the City of Glasgow, Pursuer and Respondent.—*Jeffrey—M'Farlan.*
C. S. PARKER, Defender and Advocator.—*D. of F. Moncreiff—Ivory.*

Poor.—A merchant burgess, partner of a company carrying on business in a counting-house within burgh, at which he gives his personal attendance daily for the greater part of the year, but having his dwelling-house with his family in a neighbouring parish, where he is assessed as a householder for the support of the poor,—held to be an inhabitant of the burgh to the effect of being liable in his proportion of the assessment for the poor.

Feb. 21. 1827.
2D DIVISION.
Lord Mackenzie.
M'K.

PARKER, the defender, is a partner of an extensive mercantile house, carrying on business at Liverpool, Demarara, and Glasgow, at each of which places a branch is situated, under the management of one or more of the partners. At Glasgow, the company under the firm of M'Inroy, Parker, and Company, are possessed of a counting-house situated within the city, where the business is carried on with the assistance of one or two clerks, who form the sole extent of the establishment there, the company having no property of any kind locally situated in Glasgow, except the counting-house. This branch of the concern is managed by two of the partners, Mr. M'Inroy, who resides within the city of Glasgow, and the defender Mr. Parker, who has his dwelling-house at a little distance in the Barony parish, where he rents a farm of £600 a year, which he personally cultivates and manages. At this house, in the Barony parish, he resides with his family for about seven months in the year. During this period he personally attends at the counting-house in Glasgow, five days in each week, for two or three hours a day, but eating and sleeping with his family in the Barony parish, where he spends the rest of the day in the superintendence of his farm. For the remainder of the year, in the summer months, he resides with his family at a small property belonging to him at Fairley on the coast of Ayrshire; and during this time he usually comes to town once a fortnight, when he resides for two days together or so at his house in the Barony parish, giving his personal attendance at the counting-house for about three or four hours; and in the course of the year he also has occasion to visit Liverpool on the business of the company, at least three times each year, for longer or shorter periods, as circumstances may require. Parker is further a burgess of Glasgow,—pays stent as a trader,—has been a member of the Town Council, and acted as an assessor for the poor's rates, in which character he concurred in imposing an assessment on himself for the poor of the city. He is also assessed

for support of the poor in the Barony parish, which contains upwards of 50,000 inhabitants; and the assessment there is laid on him as one of the class of householders or inhabitants, according to the rule adopted in that parish for apportioning the half of the assessment falling on that class, viz. in proportion to the real rent of the heritable property within the parish occupied by each individual. In Glasgow the assessment had originally been laid on the firm of M'Inroy and Parker, in respect of the funds estimated to form the stock of the trade there carried on; but, in 1817, at the request of the partners, this mode was discontinued, and these two partners were separately assessed on the estimated amount of the stock belonging to each in the trade carried on at Glasgow. Parker's stock in trade was then estimated at £30,000; but on his complaint that this was too high an estimate, it was in the following year reduced to £20,000. In 1819, the assessors having refused to reduce the estimated amount of his stock further, he was again rated at £20,000, and assessed accordingly in the sum of £30: 16: 8, being a certain per centage on that amount. Having, however, refused to pay this sum, on the ground that he was not liable at all, as not being an inhabitant of Glasgow under the meaning of the statutes authorizing an assessment for the poor, an action was raised against him by Buchanan, the collector of poor's rates, before the Magistrates of Glasgow, the citation to which was left for him at the counting-house of M'Inroy, Parker, and Company. In defence against this action, Parker contended that he was not subject to the jurisdiction of the Magistrates. The Magistrates, however, sustained their jurisdiction, whereupon he brought an advocation, in which the Lord Ordinary sustained the defences, and assoilzied him.

Against the interlocutor of the Lord Ordinary the collector gave in a representation; and he also raised an action in this Court, concluding for payment of the assessment for 1819, and of the sums imposed since that year. To this action it was pleaded in defence by Parker, 'That having no residence, dwelling, or domicile, either by 'himself, his family, or servants within the city,' he was not liable in payment of poor's rates for the city. The ordinary action having been conjoined with the previous process of advocation, the Lord Ordinary adhered to the interlocutor formerly pronounced in the advocation, and in the ordinary action sustained the defences, and assoilzied. The collector then reclaimed to the Second Division, who ordered Cases for the opinion of the whole Court; and hoc statu recalled the interlocutor of the Lord Ordinary, that it might not in the mean time operate as a precedent in other cases, so as to prevent the sum necessary for the support of the poor being levied as formerly, till the question should be decided. When the

cause came before the whole Court, and was about to be opened for the pursuer by the then Dean of Faculty, (now Lord Corehouse,) several of the Judges expressed a wish that an investigation should be made regarding certain allegations in the papers as to the practice of the royal burghs in Scotland in regard to assessment for the poor; an order was accordingly made for a return by the town clerks of the several burghs, and by Professor Davidson as to Glasgow, stating the manner of imposing the assessment, 'and in particular whether it is levied from mer-'chants and tradesmen carrying on trade within the burgh, at-'tending personally at the counting-house, or other place of 'business, but having their families and dwelling-houses in an-'other parish, or beyond the limits of the burgh.' From the returns made, it appeared that there were only sixteen burghs in which any assessment was levied for the poor, and that scarcely any two of these followed the same rule in imposing it, although the majority concurred in making no distinction between those traders who had both their house and place of business, and those who had their place of business only within the burgh. As to Glasgow, however, it was not expressly denied, that for many years the mode of assessment complained of had been followed;—that, in 1784, doubts having been started on the subject, the opinion of the late Sir Hay Campbell was taken, and his opinion being, that persons in the situation of the defender were liable, no further objection was made till 1798, when two persons in such situations had refused to pay their assessments, and an interlocutor of a Lord Ordinary had been pronounced, finding them liable;—that in this interlocutor they had acquiesced, and that the same mode of assessment had been since continued without objection. Under these circumstances, the cause was put out for hearing before the whole Court.

Jeffrey, for the pursuer, after detailing the facts of the case.—There are two questions before the Court. The one regarding jurisdiction is the proper question in the advocation, and the consideration of it may be postponed to that of the main question of the liability of parties in the defender's situation in payment of poor's rates, which involves the former; since, if such persons be liable to be assessed, it is difficult to see how they can be liberated from the jurisdiction of the Magistrates as to that matter.

The plea of the defender on the principal point is very simple and direct; viz. That by the act 1579, c. 74, the assessment is leviable from inhabitants, while he is not an inhabitant, and that therefore he is not liable in the burden of maintaining the poor,—

although he be a burgess and a trader in the city,—has been a bailie and an assessor,—and may have contributed to create the poor, to whose support he refuses to contribute. This is a question of construction, in which it is of importance to consider, 1st, The general principle as to the construction of statutes, such as those for support of the poor; 2d, How similar expressions in other acts of Parliament have been construed by practice and decisions; and, 3d, How far general consuetude and decisions have settled the construction of 'inhabitants,' in reference to the question here at issue.

1. The word 'inhabitant,' and the analogous terms indweller, residenter, &c., are flexible and construable terms, which may mean different things in reference to the matter in regard to which they are used; and, to ascertain the meaning in any particular statute, we must look to what was the purport of the act. There are two principles which ought to regulate the construction of statutes; the one is, that they must be construed so as to carry most completely into effect the object in view, and so as to avoid the mischief any other interpretation would allow. Now, the object of the statute under consideration was to assess generally the community of every particular burgh for relief of its poor; and, within the principle alluded to, a person in the circumstances of the defender is a member of the community. On the other hand, the mischief which would result from another interpretation would be very great, by throwing the whole burden of supporting the poor on those who cannot afford to live out of the burgh, and allowing those to escape who are most able to bear it; and it is incorrect to say, that considerations of this kind are foreign to the question of law, for every thing tending to show the object of the statute is a legitimate ground of argument. It is another principle in regard to the construction of statutes, that all remedial statutes must be liberally interpreted; and in support of these principles we have the authority of Lord Coke, who says that statutes for behoof of the poor must receive a favourable construction; and also the various authorities quoted in the pursuer's Case, (p. 24, &c.) as to the construction of 'inhabitants' and householders in the English Courts, and in particular the opinion of C. J. Eyre. Construing on these principles the statute 1579, c. 74, which lays the burden 'on the haill inhabitants within the parochin, according to the estimation of their substance, without exception of 'persons,' it is clear that by 'inhabitants' are meant persons who within the parish increase their substance. In England the possession of a dwelling-house is certainly necessary, but occupancy by the party himself is not required to render him an inhabitant under similar statutes, on the ground that a strict judai-

cal interpretation is not to be applied, when the purport of the statute shows that another was intended. We do not need, however, to go to a foreign law in support of our plea; for,

2. There is sufficient evidence in support of it, in the construction, by practice, and by decisions, of analogous statutes in our own country, by which the constructive residence occurring here has been held to bring a person under the term 'inhabitant.' Thus, in regard to the holding of offices within burgh, the act 1535, c. 26, ordains that none shall be elected provosts, bailies, or aldermen, 'but they that are honest and substantious burgesses, 'merchandes, and *indwellers of the said burgh*,' an enactment repeated to the same effect by 1609, c. 8, which declares that none shall be capable of being elected, 'but marchants and actual 'traffickers, *inhabiting within the saids burghs allenarlie*, and na 'uthers;' while, although it is settled that these acts are not in desuetude, except in regard to provosts, they have been construed (as in the case of Lawrie *v.* Magistrates of Edinburgh) so as to hold a trader or trafficker resident, merely because he transacts business within, though having his dwelling-house without the burgh; and so the defender here was himself a bailie in Glasgow in virtue of that very constructive residence, and he must therefore submit to the maxim, ubi honos ibi onus.

In like manner, by a series of statutes, the privilege of foreign trade is confined to '*freemen inhabitants*' and 'burgesses *indwell-* '*ers*.' These statutes cannot be considered in desuetude, having been founded on the case of Kirkwall, and others of a similar nature; and yet in practice they are construed to admit persons to carry on trade, not having their dwelling-house within the burgh, if they be burgesses, and have their counting-house within the burgh. The defender designs himself a 'merchant in Glasgow'—he is confessedly a burgess—and by what title does he carry on the business of a merchant, unless it be as an inhabitant? The same principle which has led to a reasonable interpretation of the statutes in reference to trade, should lead to the same interpretation here. Persons in the situation of the defender are undoubtedly inhabitants quoad the trade. It may be said, he might carry it on as a sleeping partner of a company, though not a burgess, and never within the burgh personally. No doubt he might do so, but only provided one of the partners were a freeman, and, constructively at least, an inhabitant; for he could not carry on trade by means of another person, as was held in Barbers of Edinburgh, Dec. 1. 1738, (1925.) One of the partners must be an inhabitant; but he is construed to be an inhabitant as to trade, who personally carries it on in a place of business within the burgh.

There is a third class of statutes in which a similar construc-

tion has been given to the term 'inhabitants.' The burdens of watching and warding, and paying stent, (which is admitted to be paid by the defender here,) are, by the act 1592, c. 155, laid on the '*inhabitants* of burghs, exerceand onie manner of traf-'fique, merchandise, or having change within the same;' and under this fell the case reported by Dirleton, A. *v.* B. Jan. 16. 1687 (1896,) where it was found that a burgess, though not incola, if he trade, may be stented. And it is to be observed that the act of Convention, 4th August 1665, laying the cess on inhabitants of burghs, was in subsistence in the time of Dirleton, who, in the case above mentioned, alludes to all his Majesty's taxations; nor is it unimportant also to observe, that in the case of Wilson *v.* Magistrates of Glasgow, June 15. 1759 (1900,) burgesses were found liable in payment of cess, 'in respect of their 'trade,'—thus not requiring actual inhabitancy.

The next act of this class is that of 1597, c. 279, which sets forth, that 'forasmeikle as there is diverse inhabitants that dwells 'and remains within the free burghs with their families, and are 'of reasonable substance,—as alswa hes rents and livings within 'the samin burrows, zit refusis to contribute for the enterteine-'ment of the pure, watching and warding within burgh, with the 'rest of their nichtboures, or to bear part of sik uther dewties 'as concerns his Majestie's service, thereby living at liberty, 'neither knawand the magistrates in kirk nor policy;' and ordains 'that all sik as hes their residence and duelling within the 'saids burrows be their families, and may spend ane hundred 'punds of yeirly rent within the same, or stented be the discreet 'nichtboures to be worth twa thousand markes in free guddes, 'sall be subject to be burdened with the rest of the inhabitants 'for the advancement of the glory of God, his Majestie's service, 'and the well of the burgh quhair they dwell.' This act is important, as proving that the burden of maintaining the poor is included among the ordinary burgal taxations and burdens, showing that the same principles were understood by the Legislature to apply to it, and that the same classes of men were equally liable in them all. But it is quoted as an authority on the other side, to establish that 'residence and dwelling by their families' is requisite to render persons liable as inhabitants; if, however, other statutes prove that parties merely exercising trade are liable in stents, &c. it is clear that this act could only affect those not exercising trade, and could not touch the previous liability of those exercising trade within the burgh.

This reduces the defender to the act 1579, c. 74, where the word 'inhabitants' is alone used. But, under the authorities already cited, it is clear that the word inhabitants includes persons

who are burgesses, and who carry on trade personally in the burgh, though not actually dwelling within it. Altogether independently of these authorities, however, it is no stretch to say, that a man is an inhabitant, in the narrowest meaning of the word, who passes the greatest and most important part of his existence in the burgh, —who makes his money there, and is usually present there. In popular language, such a man is an inhabitant. But when, in addition, we see him, as the defender here, holding offices—paying stent—carrying on trade—all solely in virtue of being held an inhabitant,—it would be absurd to maintain on a judaical construction of the word that he is not so. The defender, in dealing with these circumstances of his situation, takes the case in pieces, and says of each circumstance separately, that *it* will not make an inhabitant; and he therefore concludes that all of them together will not do it. But he is met by the maxim, quæ singula *non* valent, juncta valent. There is one view, however, in which any difficulty might have been got over;—the company itself might have been taxed as a person, for in those burghs where real property is assessed, companies are assessed as such for real property belonging to the company. This would exclude the objection as to the inhabitancy of individual partners, since the company must always inhabit where it trades; and if partners may be taxed through the company, where is the objection to coming on each for his share of the profits separately? Prior to 1816 the house of the defender was assessed as a company, and many companies are still so assessed in Glasgow;—which leads to the next branch of the argument—

3. How far general consuetude and decisions have confirmed the construction of the word inhabitant in reference to the poor, contended for by the pursuer. As to the returns from the other burghs, it is unnecessary to detain the Court by going through them, further than to observe, that out of the sixteen burghs where assessments are levied, nine or ten are decidedly in our favour, and the others only doubtful; while the defender's construction is not supported by a single instance of consuetude. In Glasgow the practice of assessing traders not having their dwelling-house within the burgh has been uniform, and has been sanctioned in the two cases of Allan and Buchanan, which are parallel to this. In the former, the judgment of the Lord Ordinary was acquiesced in; and as to the latter, though Buchanan had a dwelling-house in Glasgow, it is still equally against the defender's argument, which goes to this—that a man can only have one domicile at which he may be assessed. Now, Buchanan was undoubtedly domiciled in Dumbartonshire; and if this principle be correct, he could not have been assessed in Glasgow. The defender

founds on the case of Manson *v.* Cochran. The reservation, however, in that case saves the pursuer's plea; but further, that is a decision de recenti by one Division, and may properly be reconsidered in a cause before the whole Court, especially as it does appear irreconcileable to the statutes and to practice, having subjected a party to assessment in three characters,—which is quite irreconcileable with the act 1663, (that always followed as to landward parishes,) and with the decision in the case of Cargill.

It is argued by the defender, that being domiciled in the Barony parish, he is liable to be assessed there on his whole means and substance, and that he therefore cannot be assessed on the same property in Glasgow. But the fact is, that he is not assessed in the Barony parish on his whole means and substance, but only in relief of the heritor in one half of the whole assessment laid on the land under the act 1663, which is the ruling act as to landward parishes; neither is he assessed in Glasgow on his whole means, but only on his share of the mercantile concern which he carries on in Glasgow; and a double domicile as to this matter is established all over the kingdom, and sanctioned by acts of Parliament, as by the act 1597, c. 280, by which it is provided that inhabitants of burghs having livings to landward shall only be stented in the burgh according to their livings within burgh,—being stented on their livings to landward along with the barons, &c. of the shires where they lie.

Then, as to the remaining question of jurisdiction. If we are right on the merits, we cannot well be wrong here. If this be a burgal assessment, and the defender may be a bailie, it is difficult to see why he should not be bound to appear before the court of which he is capable of being a member. But, independent of this, burgal custom may authorize this, according to various decisions which will be found in the Dictionary, Vol. I. voce Consuetude; and these are not affected by the two founded on by the defender, not being relative to burgal customs.

D. of F. Moncreiff for the defender.—Any question relating to the poor laws is of great importance; but it is of chief importance that the acts of Parliament, which alone warrant an assessment, should be implicitly followed, without regard to particular usages. The measure of the statute must be the rule. It is no doubt true that, since the date of the statute 1579, a great change has taken place in the state of the population of this country; but the conclusion to be drawn from this is,—not that we should put a different construction on the act now, from what must have been given to it when it was passed,—but that we ought rather to look to the state of the times when the statute was enacted, in order to

put the true interpretation upon it. Mr. Jeffrey's argument, therefore, as to the mischiefs which might arise from a construction different from that for which he contends, only goes to this —that there may be an expediency for a new act of the Legislature, applicable to the altered circumstances of the country.

Mr. Jeffrey has treated this case as a special one, to be determined on a combination of all the circumstances attending the pursuer's situation, as having been an assessor, &c. If this were the true question to be argued, I should not be afraid to plead the specialties, as in many respects favourable to the defender; but I cannot adopt this method, which would lead to resolving such questions into special cases in every instance. The leading fact is, that the defender does not reside in the city of Glasgow, but in the Barony parish, where he has a large farm, and where, being domiciled, all the legal consequences in law have followed; and his having been a bailie or assessor does not enter much into the question, because such circumstances are merely incidental to his situation of inhabitant, if that exist; but cannot create the situation, if it does not otherwise exist. Then the question is, Whether a party so situated is liable to be assessed for the poor? There is no question as to an assessment on real property, nor as to the competency of assessing the company as a person; and any attempt to do so would bring out the impossibility of applying the pursuer's principle. The company here consists of seven partners; but it is not attempted to assess any of them except the defender and Mr. M'Inroy, though all of them, as much as they, trade within the city of Glasgow; yet to assess the company would be the same as to assess these individuals, the competency of which the pursuer expressly disclaims. It is never attempted, therefore, to assess individuals, merely on the ground of their carrying on trade within the burgh; and this is a powerful argument to show that it is equally incompetent to assess the defender, whom alone of all the non-resident partners they do assess. And on what do they assess him?—Not on his means and substance in terms of the statute,—but on £20,000, which they take as his share of the capital belonging to a company carrying on trade in different parts of the world, corresponding to what may effeir to that part of the business carried on at Glasgow; while, at the same instant, he is assessed in the Barony parish on his whole means and substance, being the only manner in which he can legally be assessed, whatever media may be adopted as the criterion for determining the extent of his means, compared with others. To see if this be warranted, we must go to the statutes; and I have no reason to dispute the general principle laid down by Mr. Jeffrey, that sta-

tutes must be construed in favour of their object. But then the question is, What was the object of the statute under consideration? When Lord Coke says that statutes for the support of the poor are to be favourably construed, he alludes only to questions arising between the poor and the public, but not to questions between individuals,—the poor being provided for,—whether one person is to pay *twice* for their support. Whether we look to law or equity, if explicit words are used, not doubtful at the time of passing a statute, they cannot be strained, from views of expediency, according as future events may turn out.

It is said that the construction of analogous statutes fixes the meaning of inhabitants here. These statutes speak of indwellers, residenters, &c., which, it is said, have been construed to mean persons not actually residing. Even if this were the fact, it would not necessarily decide the present case, as these are cases of privilege, not of burden, and so may admit of a more favourable construction. But it is not truly the fact that such words have been construed to mean persons not actually residing. It is no doubt true, that as to offices within burgh, the Court has gone a great way to hold a party entitled to enjoy an office from merely having a place of business, or even from having a room in the burgh which he never enters, or from being possessed of heritage in the burgh. But this is founded on the weight given to usage in forming the set of each particular burgh; and if carried into the present case, it would go against the law, even as admitted by the pursuer himself. Then, as to the privileges of trade, the case of the pursuer is not made out either on the statutes or the decisions. The act 1592, c. 154, gives the privilege of trade to 'burgesses,' without any other limitation; and 1672, c. 5, in like manner gives the privilege to 'freemen of royal 'burghs.' The material thing in all the statutes of this class is the being 'burgesses,'—and 'indwellers' is used loosely to signify those not having the privilege of burgesses. It is strange that the other party should have founded on the case of the Barbers of Edinburgh, Dec. 1. 1738, which is against his own argument,—it having been there found that a non-residing burgess could not carry on trade; while, if their argument were good as to the construction of the statutes, the party there must have been held to be an inhabitant, in respect of his trafficking and having a shop within burgh. As to watching and warding also, by the act 1592, c. 155, the emphasis is on the 'exerceand traffique,' and 'hav-'ing change' within burgh. A case reported by Dirleton was however quoted, to show that a person is to be considered an inhabitant, though he do not reside; but this is not the correct inference from

that case. It was there found that a burgess, if he trade, may be stented, '*though not incola*;'—not that he is an inhabitant if he trade, but that although not an inhabitant, still, if he trade, he may be stented. This is the true principle of liability for these stents, and the same is the rule as to cess. The being burgesses and traffickers is the leading quality in all the statutes subjecting to liability, and the being inhabitants is merely added as an adjunct. The essential point is the being a burgess and trader, in respect of which the burden is imposed. A burgess trading, being expressly within these statutes, might be liable qua such, and so stented, though not an inhabitant; but where the burden, as in the act 1579, is laid on inhabitants in respect of inhabitancy alone, and where no other word is used, the same construction will not follow. All that was decided by the case of Wilson *v.* Magistrates of Glasgow, quoted by Mr. Jeffrey, was, that burgesses are liable to be taxed on their trade; there was nothing regarding inhabitancy there in question,—it related only to trade.

But these analogous cases are inapplicable on more general grounds. Assessment for the poor has a quality in it belonging to none of the others referred to. If the statutes regarding the poor are to have any effect at all, every person is liable to assessment, wherever he dwells, on his whole means and substance; and none of the cases referred to of local assessments, in particular places to which the party would not be liable elsewhere, can apply to this. On the plain words of the statute it is clear, that when a man is assessed as an inhabitant, he must be assessed on his whole means and substance. The fundamental act 1579, c. 74, is still in force, and it ordains the Magistrates of burghs and Justices in parishes to landward 'to tax and stent the haill inhabit-'ants within the parochin, according to the estimation of their sub-'stance.' Here it is to be observed, 1. That the term 'inhabitant,' as used in this statute, is strictly taxative, and is connected with no other term; and the other clauses show that nothing but actual residence could be contemplated, as parties refusing to contribute to the support of the poor are directed to be 'called' before the Magistrates within burgh, and the Justices in landward parishes; so that those persons only could be intended who were liable to be called before their respective jurisdictions; and the paupers are allowed to have licenses to gather alms of the parishioners 'at their awin houses.' 2. That landward parishes and burghs are to be assessed in the same manner. The enactment is loose as to the criterion for determining the substance of the inhabitants; but, in both sorts of parishes, the assessment is to be

made according to the estimation of their 'substance;' and this also is a taxative term qualified by nothing; it is not the substance 'within the parish,' but is general, comprehending the whole substance. Now, does this statute admit of doubt or ambiguity? There is nothing flexible in it, and it is conclusive on this question; for the act 1663 relates only to the case of providing for vagabonds, and has gone into desuetude, although, by the proclamation 1692, the rule of that statute, as to dividing the assessment in two parts in landward parishes, has obtained a broader foundation than mere usage. But the act 1579 is the leading act, and it lays the assessment on 'inhabitants,' and on 'substance.' Nor does the act 1597, c. 279, weaken the other, as it was intended to limit the liability of certain individuals; and it assumes in its narrative that the meaning of the act 1579 was to include under inhabitants, only persons actually residing within the parish. The words are, 'For as meikle as there is diverse inhabitants that dwells and remains within the free burrowes with their families, &c. yet refuses to contribute for the enterteinement of the puire,'—showing that the Legislature held those only to be inhabitants under the act 1579, who resided with their families.

The statute 1663, as already observed, relates only to vagabonds; but it also, as to the assessment for the purposes of the act laid on the tenants and possessors, directs that it shall be laid on according to their 'means and substance,' without qualification. Then, as to the proclamation 1692, it lays the burden on the 'householders.' Now, assessments must either be regulated by the act 1579 exclusively, or they must rest on the act 1663 and the proclamation; but, taking either of them, the result will be the same. By the act 1579, the assessment must be laid on inhabitants, according to their substance, without qualification. By the proclamation, it must be laid one half on the householders; and as the act 1663 is referred to in this provision, it must be laid on, according to their means and substance, as there directed, and assessment can be imposed by no other rule. From this it necessarily follows that there is no warrant for an assessment on the inhabitants on any thing but their whole means and substance. The pursuer, however, does not pretend that the assessment in Glasgow is laid on according to this rule; he assesses only on the trade carried on in Glasgow, which may be a small branch of the trade carried on by the individual, or may be a losing branch of his trade, though he may have ample means arising out of other branches. This goes deeply to the principle in dispute, as the pursuer must find a legal warrant to assess on a *part* of a man's means and substance; but there is no such warrant, and the re-

cessity of splitting a man's means and substance in assessing according to the pursuer's rule shows its unsoundness.

In considering the particular situation of the defender, I do not wish to disjoin the circumstances founded on by the pursuer, as making him an inhabitant; but will first take one circumstance, and then add the others, and see if that will make inhabitancy. The pursuer admits that trading and having a counting-house alone will not do; and if trading be out of the case, that throws out also all the arguments deduced from payment of cess, &c. which depend on trading. Then it is said that personal attendance at the counting-house makes out the inhabitancy. But what does the pursuer say to the case of a managing clerk living in the Barony parish? His business is at the counting-house,—his livelihood is made there,—he is there personally from morning to night; and yet the pursuer does not pretend that a person in such circumstances is liable to be assessed. Then take a farmer or a gardener, who brings his stock into the city to market every day, and remains till he sells it, or a workman who labours in the city all day. None of these are liable, so that it cannot be personal presence which makes the inhabitancy. The defender here might carry on his whole business without going personally to the counting-house; and can the incidental circumstance of going there make him an inhabitant, when confessedly the substantial matter of trading will not have this effect? The inevitable conclusion from all this is strengthened by combining it with the fact, that the pursuer is assessed in another parish on his whole means and substance. It was said that the assessment in landward parishes is not on the whole means and substance. If it be not, then on what is it? There is no authority for laying an assessment on any thing else. It is no doubt true, that in the Barony parish the half leviable from the inhabitants or householders is laid on in proportion to the rent of the premises occupied by them; but the rent is merely a convenient rule for getting at an approximation to the proportionate means and substance of the several inhabitants, adopted to avoid the annoyance of an actual estimate, and as giving a fair enough rule for determining the proportion of each man's means and substance. Still it is merely a criterion, and is so recognised in the case of Dreghorn *v.* Lawrie; and accordingly (as found in the cases of Gammell, and of Cochrane *v.* Manson) a direct estimate may at any time be resorted to in landward parishes, instead of such a criterion; and even the act 1663, appealed to by the pursuer, demonstrates this, as it does not lay the assessment on the tenants by their rents, but according to their means and substance. The defender is therefore assessed in the

Barony parish, as the place of his domicile, on his whole means and substance, and it is therefore incompetent to assess him again in the city on part of the same means and substance. It is proper, however, to notice one case which does create a difficulty, viz. that of an apparently double domicile. In most of such cases, however, though it may be difficult, there will always be some circumstances to show which is the true domicile. But here we are not under the necessity of solving a case of double domicile. This is a case of single domicile, and it is an attempt to make a party liable somewhere else than at his domicile, and on some other ground.

There is one plain criterion of inhabitancy in regard to the poor laws. To acquire a right to be relieved, the pauper must have a residence in the parish. Now, were the defender reduced to poverty, it is clear he could not be put on the poor's roll in Glasgow, not being there domiciled; and unless he be entitled to draw benefit from the assessment, he cannot be liable in payment of it.

Another criterion is, Whether the party be subject to the jurisdiction of the magistrates; for, as the act of Parliament provides that parties refusing to pay their assessment shall be 'called' before the magistrates of the respective parishes, they can only be liable to assessment in such places where they are liable to the jurisdiction of the magistrates having authority there. Now it is clear, under the authority of the cases of Fraser *v.* Lancaster, Jan. 14. 1795, and Sharpe, Fairlie, and Co. Feb. 21. 1822, that the Magistrates of Glasgow have no jurisdiction over the defender. It is said that these cases did not relate to burgal matters; but there is no statute fixing a different rule as to burgal or any other matters; and if no citation could be given to the defender to appear before the magistrates, it goes very deep into the argument on the merits, as the statute assumes that those liable in assessment may be cited before the magistrates.

The only other matter which remains for consideration, is the alleged practice of the different burghs. Supposing that it was coincident in all, it may be doubted whether that would alter an act of Parliament. But as they all disagree with each other, and with the admitted law on the subject, it is impossible to attach any weight to such usage, which, besides, only goes a short way back, and in many cases only subsists in regard to occasional assessments. Even as to Glasgow, the usage does not go very far back; and it is plain that it has been very various, as several schemes are mentioned by Mr. Burns in his Work on the Poor, as having been adopted there. Nor is there any decision on the

subject in favour of the pursuer. The case of Allan regarded a small sum, and was only an interlocutor of the Lord Ordinary. That of Buchanan was decided expressly on the ground, that the party had there a dwelling-house, which was his proper dwelling-place. Glasgow was his original domicile: he still kept an establishment there, and resided there at times, and he was cited at his dwelling-place there; and if he was assessed at all in the country, it was only as an heritor. The case of Cargill has no reference, except in so far as the Court interfered there to prevent the heritors deviating from the statutes; and it is trusted that, in the present case, the assessors of Glasgow will in like manner be kept within these enactments.

On this argument the Court, in conformity with the opinion of the majority of the Judges present, altered the interlocutor of the Lord Ordinary, and decerned 'in terms of the conclusions in the 'supplementary action;' but found it 'unnecessary to determine 'as to the objection to the citation in the original action.'

Lord President.—My opinion has varied more than once as to this case, the facts of which are of the following nature. Mr. Parker is certainly a merchant in Glasgow,—a partner with others, having a counting-house there common to the whole firm. Mr. Parker, however, has no dwelling-house within the city, but has a house and farm in the Barony parish, where his family resides, and where he eats and sleeps; but he attends the counting-house every day. In summer he resides in Ayrshire, and visits Glasgow occasionally;—he is a burgess of Glasgow,—a member of the town-council,—has been assessor and bailie. The poor's rates were once levied on the company, but, at the partners' request were transferred to the individuals, and Mr. Parker paid in both capacities, and applied for deduction; but, after a number of years, he now refuses, and pleads that he is not liable, as not being an inhabitant. At first sight it must strike every one that it is not a very gracious plea, after paying so long, and having assessed others. At the same time, we are not to judge whether it is gracious or handsome, but whether it is legal; and I confess, after all the attention in my power, and contrary to my original opinion and inclination, and the equity of the case, I have come to be of opinion that Mr. Parker is not liable. There are three questions to be considered in relation to assessments for the poor: 1. Who have authority to lay on the assessment? 2. Who are liable to pay? and, 3. In what manner, and on what principle, is the sum to be apportioned on those who are liable? On the first point there is no complaint. The proper authority is vested in the magistrates with 'sik as they shall 'call to them to that effect.' 2. If Mr. Parker be liable, he does not complain of the amount, but that he is not liable; and that is the point to be decided. A good deal of doubt and confusion

as to the poor's laws of Scotland has arisen from the acts of Parliament not taking into consideration the change of circumstances in the country. But as it has been said that there is no equity by which a man can be hanged, so it is true that neither is there any equity by which a man can be taxed: there must be direct authority for taxing, and therefore we must take the laws as framed at the time, and see to whom they were applicable when made. If circumstances have since arisen by which orders of men exist to whom these laws are not applicable, it does not belong to Courts, but to the Legislature, to extend them to such classes of persons. On that principle, and with these views, I bend my mind to the interpretation of the acts of Parliament.

The leading act is 1579, c. 74, which orders the provost and bailies within burgh, and Justices in the parishes to landward, to make up a list of poor &c., and 'to tax and stent the haill inhabitants within 'the parochin, according to the estimation of their substance, with-'out exception of persons;' and provides, that if any refuse 'to con-'tribute, such obstinate and wilful person being *called* before saidis 'provosts and bailies within burgh, or Justices in parochinis to land-'wart, and convict thereof,' shall be imprisoned until performance. Now, taking this word 'inhabitant' in connexion with the times in which the act passed, I cannot conceive that the term should apply to the defender. In those times there was no such thing as persons having villas out of the burgh; all the traders were inhabitants; and that word could never convey any idea of a person merely trading in one place, but having a dwelling with his family in another; he might be a sleeping partner of a trading company, and as such be liable for other taxes, as cess, which is laid on traders, and in respect of trade; but, as to a tax laid on inhabitants merely, I cannot conceive how it can extend to a person in this situation. This construction is strengthened by the clause for citing obstinate and wilful persons before the provost and bailies in burghs; so that, unless it gives a jurisdiction which otherwise they would not have had, the defender cannot be held liable. It is much strengthened also by the act 1597, c. 279, setting forth that many 'inhabitants that dwells and remains 'within the free burrowes with their families,' refused to contribute to the support of the poor. Perhaps this act might have originated in some doubt as to who were inhabitants, and it describes them as those dwelling by their families within the burgh. Under this act, there can be no doubt that merely having a place of business will not do. Persons, to be liable, must have residence by their families. Questions may certainly occur as to how long residence, and what kind may be necessary; still there must be a residence.

The next act regarding the poor is 1663, c. 16; and I mention it, chiefly because it appears to me to be greatly misunderstood and misapplied. It is not applicable to the poor in general at all; it ordains all vagrant and idle poor &c. to be apprehended by those authorized, and

forced to work by all kinds of punishment, life and torture excepted; and for the encouragement of persons giving work to such, they are to be allowed so much a day, not for the poor in general, but for the poor 'so employed;' and it is only for this purpose that an assessment is authorized by that act. Then comes the proclamation in 1692, which I quote as law, having been ratified by Parliament. It sets forth by referring to the previous acts of Parliament, and bears to be 'in prosecution whereof,' and imposes the assessment on the householders of the parish. This proclamation only related to landward parishes, (the case of burghs being adverted to in that of 1693); but it may serve to show the interpretation put on the act 1579 as to what inhabitants were meant, that in the proclamation they are called householders; and surely Mr. Parker cannot be considered as a householder, who must be held to be a person keeping house within burgh. The next proclamation 1693 orders all magistrates of burghs 'to meet 'and stent themselves conform to such order and custom used and 'wont in laying on stents, annuities, or other public burdens, in the 'respective burghs'—if it had stopped here, it might have reached this gentleman, as other stents are laid on by trade; but it goes on,—'as may be most effectual to reach all the inhabitants,' bringing us back to what an inhabitant is, and a person must be so, to be taxed by this proclamation; and, upon the whole, it does appear to me impossible to reach this gentleman, whom I cannot consider as an inhabitant. As to the cases quoted, there are hardly any coming precisely to this. The case of Buchanan does not, as he certainly had a dwelling-house in Glasgow, in which he kept servants, and where he did occasionally eat and sleep, and to a certain extent was an inhabitant. The case of Cargill does not apply to this, the question being as to the rule of proportioning the half on the tenants, when it was found that there must be but one rule as to all. In the case of Manson *v.* Cochrane, the Court adopted the rule of 1579, stenting all persons in the parish according to their substance; and whether it was right or wrong, it does not apply here, as the gentleman was unquestionably a residenter; and, on the whole, I feel compelled to give an opinion that Mr. Parker is not liable.

Lord Justice-Clerk.—When this case came before us in the Second Division, we thought it right that a question of such importance should be decided by the whole Court. After the opinion given by your Lordship, however, I shall only make a few observations in addition, concurring as I do in that opinion, although I fairly confess that, from the circumstances alluded to by your Lordship, I did approach the consideration of the case rather with a prejudice against Mr. Parker's plea; but after going through all the statutes, and analogous statutes, I am satisfied that as to assessments for the poor within burgh, it is impossible to come to any conclusion, but that actual inhabitants were alone intended at the time of passing these statutes; and in a question of taxation founded on statute law, we must interpret the statutes as

would have been done at the time of their being enacted; and it is quite apart to allow considerations of expediency to have any weight in construing these acts of Parliament. As to the statute 1579, I would observe, that within the act itself there is a clause besides that alluded to by your Lordship, illustrating the meaning of inhabitant, viz. that which provides a power to persons therein mentioned to grant licenses to beg alms, instead of resorting to contributions; and persons having such licenses are to ask alms of parishioners 'at 'their awin houses;' and in virtue of such licences they certainly could not go beyond the bounds of the parish. I will just make another observation as to qualifications for offices within burghs. It is free from all doubt, that if it were not that usage and practice creates the set of a burgh, and if the question were raised for the first time, there could be no hesitation in rejecting the fictitious residence of having a shop &c., and giving the privilege to those only actually residing; and where there has been no such usage thus constituting the set of the burgh, the Court has always required actual residence, as in the case of Queensferry, (the judgment in which was affirmed on appeal,) where one of the deacons was only separated by a strand from the royalty, and his vote was rejected. There is one other act to which I beg your attention, viz. the act 1663, as showing the understanding of the Legislature itself as to the meaning of 'inhabitants' used in 1579, c. 74; for, in reciting that act, it states the object of it to be 'to tax and stent the *persons within the parish*.'

As to the other matters of the case, it is not necessary to trouble your Lordships with them, after the opinion which has already been delivered; but as to the proclamation, (which, though I believe it weighs greatly with some of my brethren, was not founded on at the Bar,) I shall only observe, that we cannot stop short at the words 'used and wont,' and say, that, in virtue of it, we are entitled to tax people never in the burgh at all, because such persons may be taxed for certain stents. We must go on with the words, 'so as to reach 'the haill inhabitants,' and put a common sense meaning on them.

In regard to the practice inquired into since the case was before us in the Second Division, it appears so vague and various,—so loose, and so irreconcileable to any view of law, that I cannot allow my mind to be influenced by it; and although the practice in Glasgow has been so, still it is not supported by law; for even supposing Mr. Parker an inhabitant, he must be assessed for his whole means and substance from whatever source, and his personal estate wherever situated. Both in Dreghorn and Carrick it was so decided. There, the parties were not taken as the partners of the concerns which they carried on, but their whole substance was taken. This is a most important circumstance, that inhabitants must be assessed in their whole means and substance, and shows the incorrectness of the rule founded on by the pursuer. On the whole, I am for adhering.

LORD COREHOUSE.—I consider this case to be attended with great

difficulty, arising from the proclamations, on which I consider the poor laws to rest, not being so explicit as they should be; but I have formed a clear opinion, different from that now expressed. It is proper to attend to the footing on which the poor laws now rest. It was stated from the Bar, on both sides, that they rest on the act 1579. I consider that view to be wrong, and that they rest entirely on the proclamations. The act 1579 proceeds on an universal assessment of means and substance, without any distinction of proprietors of lands and heritage, and other inhabitants, or between burghs and landward parishes. The act 1663 was for a particular purpose; not for the aged and impotent, but raising assessment to maintain vagabonds, which was laid by this act, the one half on the heritors, and the other half on the possessors. It is well known that the act 1663, and the subsequent one of 1672, went into desuetude. We have the opinion of Sir George Mackenzie to that effect. Then came the proclamations, which do not revive the act 1579 universally; on the contrary, they borrow the rule of landward parishes from the act 1663, laying one half on heritors, and the other on householders—extending that mode of assessment, originally intended for vagabonds only, to the general assessment for the poor. They do not provide how it is to be laid on individuals; but it has been construed that as to the share laid on heritors, it may be levied according to the valued or the real rent;—or, for aught I see under the word 'otherways,' it may legally be laid on according to the means or substance of the heritors. In practice, the other half is laid on tenants according to their rents, and not on means and substance, until perhaps a late decision. As to burghs, there is a distinct rule laid down in the proclamation 1693, which is, that they shall be taxed 'conform to such order and custom used and wont in laying 'on stents, annuities, and other public burdens in the respective 'burghs, as may be most effectual to reach all the inhabitants.' It is not required that all burghs should stent in the same manner, but merely that they shall do so conform to the usage in each burgh respectively. Great latitude therefore is allowed, and the mode must be such as not only to follow the rule of ordinary stents, but also to reach all the inhabitants, even though not liable to stents. Such being the principle of assessment, we must attend to the circumstances of the case. There is no dispute as to facts; and the question is, Is this gentleman liable under the proclamation 1693? The argument of the defender rests on the construction of the word 'inhabitant,' as used in the act 1579. I humbly conceive that a statute of this kind must be construed according to equity, not to law, as, by the authorities of England, all remedial statutes are to be liberally construed. It is in vain to say that this is not a question between the public and the poor. It is a most important point to the poor, whether a great proportion of merchants in Glasgow shall or shall not be subject to taxation for their sup-

port. But, even between two individuals, where there is a general taxation, there must be an equitable construction in relation to them, and not one of strict law. Then let us see on what principle 'inhabitant' is restricted to those levant et couchant. I cannot help thinking that the construction put on various other acts of Parliament, containing the words inhabitant and indweller, is of great importance. As to offices within burgh, I had understood that by law persons were eligible, although not strictly inhabitants, and that the Queensferry case was decided on words of set, and not on general law. But there is another most important class of statutes in relation to carrying on foreign trade, which always requires two requisites, being a burgess and an inhabitant; and these have been liberally interpreted, so as to include persons not having a dwelling-house within burgh. As to sleeping partners, it is never inquired whether they are inhabitants or no; but there must always be one partner of the company subject to burgal prestations, in order to enable them to enjoy the privilege of conducting their trade, which could not be carried on by a clerk. The act 1466, c. 11, declares that none shall trade but 'freemen burgesses dwelland within burgh, or their famiiliars, factours, servantes, being with theme in househalde at meate 'and drinke.' The act 1503, c. 84, leaves out burgesses, and says that no persons dwelling outwith burghs shall carry on trade; yet, notwithstanding, these statutes have been construed in practice so as to permit numerous persons living out of burgh to trade, if having a counting-house within it. A case mentioned by Mr. Jeffrey, Barbers of Edinburgh *v.* M'Duff and Menzies, contains a commentary on the meaning of the statutes. The party there was found entitled by the Lord Ordinary to go on with his trade in Edinburgh while he resided in Leith, and of course was able to give his personal attendance at his place of business. But in the course of the proceedings he removed to a distance in the north, where he was no longer able personally to carry on business, or perform watching and warding, and he was then found not entitled to do so by another. Here, then, is a class of statutes still in observance, in which a party is construed to be an indweller, if in a situation personally to carry on business in the burgh. Then, as to the statutes regarding public burdens and limited to indwellers, it appears from the act 1597 that it had been pleaded that persons not trading were not liable; and this was the cause of the act 1597 extending the burden to the whole inhabitants, whether trading or not. But it does not define inhabitants as *levant et couchant*. We must give to that term the meaning put on it ever since—that it means persons residing in a situation where they can personally carry on business. Thus we have the word inhabitant in those statutes construed to extend to persons in the situation of the defender. It would indeed be a great mischief, if that class of persons most able to support, and who create the poor, should be exempted on account of that very fortune, which, while it enables them to have

separate residences at a distance from their place of business, renders them most proper to be subjected to the burden of supporting the poor. But when we come to the proclamation 1693, there can be no doubt, as it includes at least all who are stented, though it also warrants a mode of assessing, so as to reach the whole inhabitants. This is not a restrictive, but an extending clause; and therefore I conceive that Parker is equally liable in assessments for the poor as he is for stents on trade.

As to the collateral arguments used for the defender, I think they are all without foundation. It is said the principle of the defender goes too far, since if Parker be rightly assessed, other traders never within the burgh, as sleeping partners of companies trading in the burgh, may be stented. The answer to this is, that sleeping partners are not known to the Magistrates, and they take the representatives, who, as burgesses and residenters, carry on the trade.

It was stated at the Bar that, taking the act 1579, it was incompetent to assess on means and substance in various places. This proceeds on a misapprehension of the law; for it is nowhere said that persons having merely moveable property cannot be assessed in more parishes than one. But a mode of relief is provided as to burghs in the statute 1597, c. 276, declaring that persons are not to be taxed within burgh on their lands and livings outwith burgh; and if Parker is taxed elsewhere on his living outwith burgh, he can get relief, which he would not have, if he were assessed as a possessor in more than one landward parish. And this also answers another objection, and justifies the Magistrates in restricting the assessment to the stock in trade within burgh, as they are prohibited by the act 1597 from taxing persons having property outwith burgh, not merely for their *lands*, but also for their *livings* outwith burgh; and besides, if that be the consuetude of the burgh as to other town taxes, then, as directed by the proclamation, it must be the rule for assessing for the poor also.

Another objection is founded on this—that if Parker were a pauper, he would not be entitled to relief. It is sufficient, in answer, to say, that the obligation and claim are not co-relative, as one may be taxed on land in half a dozen parishes without being entitled to relief; and also a man may be an householder, and yet not have a domicile for three years.

Last of all, it is said that the statutes have in view persons living within the jurisdiction of the Magistrates, from the remedy provided for persons refusing to pay their assessments; but this provision arose from all the inhabitants, at the time of passing the act, living within burgh. If liable, however, for the tax, the remedy would apply.

None of these collateral arguments, therefore, support the judical construction contended for by Parker, especially as I can see no authority for saying that a man cannot be assessed on means and substance in more parishes than one. As to the consuetude of Scot-

land, it certainly is not sufficient, and we must lay it out of view; but I cannot lay that of Glasgow out of view, as, under the terms of the proclamation 1693, the usage of each particular burgh must regulate; there can be no doubt as to the usage here, and we have also the judgment by the Lord Ordinary in the case of Allan acquiesced in. I do not think the case of Buchanan a precedent in point here; but it touches an argument which shook me for some time, as to whether a person can be assessed in two parishes, as Mr. Buchanan had a domicile in Dumbartonshire, where he might have been assessed according to his means and substance. It is not necessary to allude to the case of Cargill, as it has nothing to do with this question; nor has the case of Cochrane *v.* Manson. I have some doubts as to that decision, not so much from the conclusion come to by the Court, as on the ground that the act 1579 is there taken as the rule for assessment. I do not think it wrong to assess a man in two characters, as an heritor and a householder. He may properly be assessed on his lands as heritor, and on his means as householder; but my objection is, that the party in that case was assessed in three characters, and there the decision is wrong.

On the whole circumstances, therefore, in the question in the ordinary action, I am inclined to think Mr. Parker liable. As to the question in the advocation, I am rather inclined to think that the Magistrates were wrong in sustaining their jurisdiction; for, while a statute, so far as it is remedial, must be construed liberally, yet, so far as it is of a different character, it may be construed strictly.

The other Judges did not deliver their opinions, but the votes were given as follows:—

For adhering to the Lord Ordinary's interlocutor, LORDS PRESIDENT, JUSTICE-CLERK, PITMILLY, MEADOWBANK, MACKENZIE, and NEWTON.

For altering, LORDS CRAIGIE, BALGRAY, GILLIES, ALLOWAY, CRINGLETIE, ELDIN, MEDWYN, and COREHOUSE.

Pursuer's Authorities.—A. *v.* B. Jan. 16. 1667, (1896); Barbers of Edin. Dec. 4. 1738, (1925); Allan *v.* Lawrie, Feb. 3. 1792, (by Lord Dreghorn, not reported); Collector of Glasgow Poor's Rates *v.* Buchanan, Nov. 22. 1798, (not reported); Town of Inverness, Nov. 1663, (13061); 2. Coke, Inst. 702; Rex *v.* Hall, (1. B. and C. 123); Rex *v.* Poynder, (1. B. and C. 178.)

Defender's Authorities.—1579, c. 74, 1597, c. 279, and Mackenzie's Obs. p. 303; 1. Ersk. 7. 63; Lawrie, Dec. 2. 1797, (10587); Ross *v.* Carrick, Dec. 16. 1800, (Ap. Poor, 3); Gammell, May 30. 1822, (not reported *); Cochrane, Feb. 11. 1823, (ante, Vol. II. No. 183); Fraser, Jan. 14. 1795, (F. C.); Sharpe, Fairlie, and Co. Feb. 21. 1822, (ante, Vol. I. No. 382.)

W. DICKSON, W. S.—MACMILLAN and GRANT, W. S.—Agents.

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* This case was compromised, after a reclaiming petition had been ordered to be answered.

No. 231. Lieutenant D. CAMPBELL, Suspender.—*Jameson—Donald.*
Colonel A. MACDONELL, Charger.—*Skene—Matheson.*

Process—6. *Geo. IV. c.* 120—*Legal Diligence.*—Held,—1.—That it is incompetent, after the record is closed, to turn an irregular charge into a libel;—and,—2.—That a charge against the drawer of a bill, proceeding on a protest recorded, not in the jurisdiction where he resides, but where the bill is payable, is irregular.

Feb. 22. 1827.
1st DIVISION.
Lord Eldin.
H.

LIEUTENANT CAMPBELL, as drawer of a bill for £121. 5s., dated Fort William, 14th August 1817, payable four years thereafter, and accepted by John Campbell, was charged at the instance of Macdonell of Glengary, who had acquired the bill by indorsation. Of this charge Lieutenant Campbell brought a suspension on various grounds, but particularly that the protest on which the diligence proceeded had been recorded in the books of the Sheriff of Inverness-shire, whereas he had, more than two years previously, left that jurisdiction, and now resided in the county of Ayr; and he therefore contended that the charge was inept. In answer to this objection, the charger admitted the facts on which it rested, but proposed, in his answers to the reasons of suspension, that the charge should be turned into a libel. He, however, allowed the record to be closed before getting this done; and thereafter, on hearing parties upon the preliminary objections, and particularly upon that to the regularity of the diligence, the Lord Ordinary 'turned the charge into a libel, and appointed 'the counsel for the parties to be ready to debate on the merits 'at next calling.'

Campbell then reclaimed, and contended,

1. That, after the record was closed, it was not competent to turn the charge into a libel; and,

2. That if it was not so, then, as his objection was well founded, the letters ought to be suspended.

To this it was answered, That as it was part of the established law of Scotland that an irregular charge might be turned into a libel at any time before final judgment, and as there was no provision in the Judicature Act either taking away that privilege, or prohibiting its being exercised after the record was closed, a party could not be deprived, by implication, of the right vested in him.

The Court unanimously altered, suspended the letters, and found expenses due.

LORD GILLIES.—According to the act of Parliament, the preliminary defences or objections must be disposed of before closing the record. But the Lord Ordinary has in this case closed the record,

and then heard parties on the preliminary objections, which is quite irregular. It is only in the case where there are no such objections or defences, or where they have been finally disposed of or reserved, that the record can be made up. By turning the charge into a libel, it is plain that his Lordship considered the objection well founded; and indeed this is not disputed. If the question had been with the acceptor, it might have been different, as Fort William was the place of payment, and he was bound to come there and pay the bill; but it is one with the drawer, from whom payment can be demanded only in the event of the failure of the acceptor. As, therefore, it is not now competent to turn the charge into a libel, the objection must be sustained.

LORD PRESIDENT.—I am entirely of the same opinion. What is this but an amendment of the libel? And is it competent to amend the libel after the record is closed? Certainly not. All defences and objections of a preliminary nature must be disposed of before the record is made up, except in the case where probation may be necessary, and where the Lord Ordinary may think proper to reserve them.

LORDS BALGRAY and CRAIGIE concurred.

J. GEMMELL,—J. MACDONELL, W. S.—Agents.

J. AUCHINLECK, Pursuer.—*More.* No. 232.
J. CRAIG and A. BAXTER, Defenders.—*Skene—Christison.*

THIS was a question, whether the pursuer had shown a sufficient title to demand exhibition of certain title-deeds alleged to be in the hands of the defender. The Lord Ordinary sustained the title; but the Court, being satisfied that she had shown no evidence of it, altered and assoilzied.

Feb. 22. 1827.
1ST DIVISION.
Lord Eldin.
D.

W. and A. G. ELLIS, W. S.—W. RENNY, W. S.—Agents.

J. BOYD, Pursuer.—*A. Murray.* No. 233.
J. SHAW, Defender.—*Spiers.*

Process—Declarator—Poor's Rates.—A party having raised a summons concluding for reduction of a decree finding him liable in poor's rates beyond what he was liable for, and also for a declarator as to the rule which ought to be followed in future; and decree of reduction having been pronounced, the Court refused to decide on the declaratory conclusion, as there was no proper party having interest before them.

THE pursuer, who was tenant of an extensive farm in the parish of Falkirk, having been assessed with poor's rates on the rent, being £480, and a decree having been pronounced against him by the Justices of the Peace of Stirlingshire for the

Feb. 23. 1827.
1ST DIVISION.
Lord Medwyn.

amount, being £4 : 7 : 8, he brought an action of reduction of the decree and of declarator against Shaw, the collector for the parish.

No opposition being made by the defender to the decree of reduction, (because, as he stated, he considered the mode of assessment which had been practised to be unjust,) the Lord Ordinary decerned to that effect, and appointed parties to be heard on the declaratory conclusions. That conclusion was, that it should be found that 'the pursuer is not liable to be assessed for poor's 'rates, conform to the said gross rent of his farm, as a standing 'rule of assessment; but that he is liable to be assessed for his 'proportion of poor's rates, along with the haill inhabitants of the 'parish, according to their means and substance, wherever si-'tuated.'

On this point his Lordship appointed Cases, which he afterwards reported to the Court; but their Lordships, considering that the question in dispute between the parties had been exhausted by the decree of reduction, and that they could not be called on to give judgment upon a declarator where there were no parties having interest before them, dismissed the action.

J. Brown,—Ker and Dickson, W. S.—Agents.

No. 234.

Mrs. Scott, Pursuer.—*D. of F. Moncreiff—Shaw.*
J. Napier, Defender.—*Sol.-Gen. Hope—Skene—Christison.*

Process—Title to Sue or be Sued—Partnership.—The manager and partner of a private banking company having acquired a disposition and assignation to an heritable right as manager; and having, after the dissolution of the company, claimed in virtue thereof in a ranking and sale; and having been opposed by the granter of the deed on the ground of its having been obtained usuriously and by fraud; and the granter having raised an action of reduction in support of the objections to the claim, and having directed it against him as manager of the company, and not having called the partners—Held that the summons was irregular,—that he could not be sued as such,—and that process must be sisted till the other partners were called.

Feb. 23. 1827.

1st Division. Lord Eldin. D.

The late William Glendonwyn of Glendonwyn, (who had three daughters,) having disponed his estate of Parton, under burden of the price of £60,500, to Mr. Scott, (who had married the youngest daughter,) and having died, Mrs. Scott acquired right to one-third of the price as one of the three heirs-portioners, and also to a provision of £4000 as a preference over her other two sisters. In the month of November 1812, Mr. Scott granted an heritable bond and disposition over the estate of Parton to Mr. Napier for £15,000; and immediately thereafter Mrs. Scott, on the narrative

of that deed, granted a disposition and assignation, whereby she consented that Mr. Napier, his heirs, assignees, and successors, should be a preferable creditor to her both over the price and the lands themselves; and she also assigned to him her one third share or portion, together with the preference of £4000.

Thereafter, in January 1813, she granted another disposition and assignation, on the narrative that the Galloway Banking Company had agreed to grant to her husband a cash-credit for £10,000, on condition of his granting a bond and disposition over the lands of Parton, and that Mrs. Scott should assign in security her share of the price thereof. She accordingly, in consideration of the cash-credit, assigned to Mr. Napier, as manager of the Galloway Banking Company, and to his successors in office, her third share or portion of the price, and also her preference; and declared that in all competitions Mr. Napier as manager, and his successors in office, should be preferable to her.

Mr. Scott having become bankrupt, a ranking and sale was brought of the estate of Parton, in which Mr. Napier, founding on the above deeds, claimed to be ranked on the one in his own behalf, and on the other as manager of the Galloway Banking Company. To these claims objections were lodged by Mrs. Scott and her tutor ad litem, on the ground that the deeds had been obtained from her with a view to support certain extensive usurious transactions in which Mr. Napier had got her husband involved; that they had been procured from her by means of fraud and deception; and that they were otherwise ineffectual in point of law. In answer to these objections, Mr. Napier contended that they could not be listened to, except in a reduction, and that he was therefore entitled to be preferred hoc statu.

In the mean while the Galloway Banking Company had been dissolved; and to obviate the above plea, Mrs. Scott, with concurrence of her tutor ad litem, brought an action of reduction against Mr. Napier, 'for himself, and as manager of the late 'Galloway Banking Company,' in which, after calling for exhibition of the two deeds granted by her, and other relative writings, she alleged that they had been obtained for usurious considerations, and therefore 'the said dispositions and assignations being 'granted and received as collateral obligations for the securing 'and realizing to the said John Napier for himself, and as ma-'nager foresaid, more than lawful interest, are null and void in 'terms of law, and of the act of Parliament before recited;' and she concluded that, for that and for various other reasons libelled, and particularly fraud, they ought to be reduced.

This summons having been remitted to the process of ranking

and sale, Mr. Napier maintained, as a preliminary defence, that as he was called as manager of the Galloway Banking Company in relation to bank transactions, Mrs. Scott was bound to call his partners and their representatives; and he also contended that the summons was irrelevant, or at least was not sufficiently specific in the form in which it was laid.

To this it was answered,

1. That as the first deed libelled was in favour of Mr. Napier individually, he was the proper party; and that with regard to the other, as it was taken in his favour, he stood in the situation of a trustee whose constituents it was not necessary to call.

2. That as the reduction had been brought to obviate a point of form pleaded in the process of ranking and sale, and as he there claimed in the character of manager, he stood in the situation of a pursuer; and that as the reduction was truly of the nature of a defence, he could not object to its being brought in the form in which he himself appeared as a claimant in Court; and,

3. That as he was the leading partner, and was called nominatim as representing the others, and as it had been decided in the late case of the Sea Insurance Company (see ante, No. 226,) that it was sufficient to call the office-bearers, the defence was unfounded.

The Lord Ordinary repelled this defence; but the Court altered, and sustained the dilatory one, 'in so far as the defender is 'called and concluded against as manager of the Galloway Bank-'ing Company; and remitted to the Lord Ordinary to sist the 'present process to that extent, until the proper persons are called 'and made parties to the action.'

Lord President.—The Galloway Company is dissolved—the partners of it are no longer in communication with Napier, and his office of manager has ceased. Even if the pursuer were to succeed in reducing the deeds as against Napier, it would be of no avail against the other partners. Besides, the reduction is laid on the head of usury committed by the Galloway Banking Company, and therefore the partners of it ought to be in the field, in order to meet and explain that charge.

Lord Gillies.—There is no usury on the face of the bond; and, in order to prove the allegation, the pursuer must go into extrinsic circumstances, and particularly the transactions with the bank. But the partners are the proper parties with whom to discuss that question. This is not the proper stage for inquiring into the regularity of the summons; that can only be done after the preliminary defences have been disposed of.

LORD CRAIGIE.—I have considerable doubts of the opinions which have been expressed. Private banks have been allowed to sue in name of their manager; and indeed, if they were not so, I cannot see how they could obtain adjudication for any debt which may be due to them. But, at all events, when a party has been authorized to act as manager, and to take deeds in that character, I apprehend that he is not entitled to abandon it, and insist on the partners being called; and that more especially when he is charged with having obtained these deeds usuriously, and by fraud and deception.

LORD PRESIDENT.—When I first came to the Bar, no private company was entitled to sue in its social name. It was necessary that it should be in name of the partners, as trading under a particular firm.

LORD BALGRAY.—If this were a question as to inflicting a punishment on Napier for having done illegal acts in the character of manager, perhaps Lord Craigie might be right; but the object of this action is to set aside a deed belonging to the Galloway Banking Company, and which he holds as a mere mandatory. Besides, it is rested on a charge of usury by the partners of that bank, and therefore they must be called.

DONALDSON and RAMSAY, W. S.—R. RUTHERFORD, W. S.—Agents.

J. HUNTER, Petitioner.—*Jameson.*
J. DICKSON or ROUGHEAD, Respondent.—*Skene.*

No. 235.

Appeal.—Circumstances under which leave to appeal was refused.

Feb. 23. 1827.
1ST DIVISION.
H.

AFTER the judgment had been pronounced in this case, (see ante, Vol. V. No. 157,) Hunter presented a petition for leave to appeal. This was resisted on the ground chiefly, that if he were permitted to do so, the respondent would not be able to obtain interim execution; and that the case was in such a shape, that it might be finally exhausted by a simple motion before the Lord Ordinary.

The Court, on these grounds, refused the petition.

J. H. LOTHIAN, W. S.—R. MATTHEW,—Agents.

No. 236. TUTORS of the EARL of EGLINTOUN, Petitioners.—*Jameson.*
W. F. WALKER, Respondent.—*Hamilton.*

Appeal.—Circumstances in which leave to appeal was refused.

Feb. 23. 1827.
1ST DIVISION.
S.

AFTER the dilatory defence pleaded in this case had been repelled, (see ante, Vol. V. No. 145,) the petitioners applied for leave to appeal; but the Court refused it, as there were other dilatory defences which ought to be disposed of in the first place, otherwise an appeal might be taken on each of them.

TOD and HILL, W. S.—J. CAMPBELL, W. S.—W. WADDELL, W. S.—Agents.

No. 237. F. C. STEWART, Pursuer.—*D. of F. Cranstoun—Moncreiff—Skene.*
S. M. FULLERTON and Others, Defenders.—*Jeffrey—Fullerton.*
Et è contra.

Tailzie—Reparation.—A party having succeeded to an estate by virtue of an entail prohibiting sales, but against which there was no irritant nor resolutive clause—Held,—1.—That he was entitled to sell the estate;—but,—2.—That he was bound to reinvest the price in lands, and to take the titles under the terms of the entail.

Feb. 23. 1827.
1ST DIVISION.
Lord Alloway.
H.

BY a deed of entail, dated the 28th of May 1763, and recorded in the register of tailzies on the 3d of July 1771, John Murray of Blackbarony, otherwise John Stewart of Ascog, granted procuratory for resigning the lands of Ascog, lying in the county of Bute, and others situated partly in Argyleshire, and partly in Peebles-shire, whereby, on the narrative that he was 'resolved, for 'the standing of my family, to make the settlement and tailzie after 'mentioned, with and under the burdens, provisions, clauses irri-'tant and resolutive, after expressed,' he resigned the lands for new infeftment to himself and his wife in liferent, and the heirs-male of his body in fee, whom failing, a long line of heirs-substitutes, but 'with and under the several provisions, restrictions, irritancies, 'and burdens after expressed, and reserving to my said spouse 'the liferent provided or to be provided to her of the whole or 'any part of the said lands; declaring hereby, that the said heirs 'of tailzie and their foresaids, according to their order above, 'succeeding to me, shall, by acceptation of these presents, not 'only be personally liable for all my just and lawful debts already 'contracted, or which shall hereafter be contracted, and shall be 'justly due by me at the time of my decease, and for all gratuitous 'bonds, bills, and other obligations that shall be granted by me,

'to the value of the estate succeeded to; but also the lands and 'others foresaid and maills and duties of the same, shall be 'really affected and burdened therewith, with a preference to all 'others; and further, the said heirs of entail, and the husbands 'of the heirs-female, shall be hereby bound and obliged to use 'the name and wear the arms of Stewart of Ascog.'

Then followed these prohibitions:—'And it is hereby expressly 'provided and declared, and shall be contained in the infeftments 'and others to follow hereupon, that it shall be noways leisum or 'lawful to the heirs of tailzie and others succeeding to me by 'virtue hereof, in no time coming, to alter, innovate, and annul 'this present tailzie, or invert the order of succession hereby ap-'pointed and settled by me, or which shall hereafter be appointed 'and settled by a writing under my hand, in manner foresaid, 'any manner of way, nor to possess the above lands and estate by 'any other title than by this present deed of entail; and they 'shall be bound to registrate the same, and any additional settle-'ment or deed relating thereto, in the Record of Tailzies and 'General Register, within six months after my decease, and their 'coming to the knowledge thereof; nor shall they have any power 'or liberty to sell, annailzie, or wadset the lands and others 'foresaid, or any part thereof, except allenarly such a part and 'portion of the same as shall be found necessary for relieving, 'paying, and satisfying the debts and obligements contracted and 'granted by me, and which shall be justly resting by me the 'time of my decease, or so much of my said debts as shall not be 'cleared and satisfied by any of the heirs of tailzie out of their 'own proper means and estate, in manner underwritten, with 'power to any of my heirs of tailzie succeeding to me, by virtue 'of these presents, to wadset, under reversion, so much lands 'allenarly as shall correspond and have just proportion to my 'said debt resting and unpaid in manner foresaid, and no more, 'and whereof the maills and duties shall not exceed the annual 'rent of the debt to be paid therewith; nor shall the said heirs 'of tailzie, and others succeeding to me in any time coming, 'have power or liberty to contract any debts or sums of money, 'or even grant provisions to younger children, sons or daugh-'ters, except as hereafter is provided, whereby the lands and 'others above written may be anyways affected, or grant any 'heritable or moveable bonds, infeftments of annual rent, and 'other rights and securities whatsomever, whereby the lands and 'others foresaid may be anyways evicted or carried off, to the 'prejudice of the next succeeding heir of tailzie; nor shall the 'said heirs of tailzie, or others succeeding to me, suffer or permit

'the lands and others above written, or any part thereof, to be 'adjudged for any debt due by me, at least shall not suffer the 'legal reversions of the said adjudications to expire, but shall 'timeously redeem the same before they be within two years of 'expiry; nor shall they suffer the lands and others foresaid to 'fall in the superior's hands, by not timeous payment of the feu 'and other duties payable furth thereof, nor by recognition, 'or otherwise; nor shall they commit the crime of treason, or 'lease Majesty, whereby the lands and others foresaid may fall 'in the King or Queen's hands, by reason of forfaulture, any 'manner of way.'

These prohibitions were followed by the irritant and resolutive clauses in these terms, (but which, it will be observed, were not directed against sales):—'Declaring, likeas it is hereby expressly 'provided and declared, and shall be provided and declared in 'the charters, infeftments, and others to follow hereupon, that if 'any of the heirs of tailzie above mentioned, or the husbands of 'the heirs-female, shall not use the name and arms of Stewart of 'Ascog, or shall alter and innovate this present tailzie, or invert 'the succession from the order hereby appointed, or which I shall 'appoint by a writing under my hand, or possess the said lands 'and estate by any other title than these presents, or fail to re-'gister the same, or any additional settlement relating thereto, in 'manner as above, or if they wadset any of the lands and others 'foresaid, except so much allenarly, or such a part or portion of 'the same, as shall be found necessary for relieving, satisfying, 'and paying the debts and obligements contracted, and which 'shall be justly resting the time of my decease, or so much of 'my said debts as shall not be cleared and satisfied by my said 'heirs of tailzie, their own means and estate, in manner foresaid, 'and which they have power to wadset, in the terms above pro-'vided allenarly; or, if they shall contract any debts, or grant 'any provisions to younger children, sons or daughters, (except 'as hereafter is provided,) or grant any bonds, heritable or move-'able, or other rights or securities, whereby the lands and others 'foresaid may be affected, evicted, or carried away to the preju-'dice of the next succeeding heir, then not only shall the deeds 'so to be done by them be void and null in themselves, as if the 'same had never been granted or done, and shall be noways va-'lid for affecting and burthening the lands and others foresaid, 'or any part thereof, to the prejudice of the next succeeding heir 'of tailzie their peaceable possession, bruiking and enjoying of 'the same free of the said debts, deeds, and burdens thereof; but 'also, the said heir contravening, for him or herself alone, shall

'ipso facto lose and amit the benefit of this present tailzie, and 'the lands and others foresaid shall fall and accresce to the next 'heir provided to the succession as above, in the same manner as 'if the former heir who shall contravene had never existed, or 'had been deceased; and the said heir contravening shall be ob- 'liged to denude in favour of the next heir of tailzie, who shall 'have power and liberty to enter and obtain themselves infeft in 'the lands and others foresaid, by way of adjudication, declara- 'tor, service, or any other method that in law shall be proper, as 'accords.' The deed also contained a general disposition of all the heritable and moveable property of which the granter should die possessed in favour of the heirs-substitutes, declaring that they 'shall be holden and obliged, in the strictest manner, by 'their acceptance hereof, to convert the said heritable and move- 'able subjects, generally above disponed, into money, and to up- 'lift the debts and sums of money above assigned; and, after 'payment of my proper debts, and the legacies, if any be, to 'ware, employ, and bestow the free residue or remainder of my 'said separate effects, heritable or moveable, when so converted, 'upon purchasing of land in Scotland, and to take the rights and 'securities of the lands so to be purchased, in the form of a strict 'entail, to the same series of heirs, and with and under the same 'conditions, provisions, burdens, reservations, restrictions, limita- 'tions, clauses irritant, and faculties, as are above set down with 'respect to my tailzied lands, herein mentioned, and to put the 'said tailzie on record, so as the lands thus to be purchased, and 'these my other lands, may be conjoined inseparably in all time 'thereafter.' There were also various other clauses which were not material to the question at issue.

In virtue of this deed, Archibald M'Arthur Stewart, on the death of the granter, succeeded to the lands, and from the proceeds of the moveable estate he purchased other lands, of which, in July 1783, he executed an entail precisely in the same terms as the former, and which was recorded in the register of tailzies on the 21st of October 1815. The lands contained in these two entails then devolved, by the death of Archibald M'Arthur Stewart, on the pursuer, Frederick Campbell Stewart, who made up titles, and was infeft in virtue of them. In consequence of the defect as to sales in the irritant and resolutive clauses, he brought a summons of declarator against the heirs-substitutes, in which, after reciting the entails, and that he was seised in the fee of the lands, and alleging that, 'not being prevented by the said deeds 'of tailzie or otherwise from so doing, he has full power to sell 'and alienate the said lands and others contained in the said two

'deeds of tailzie, and to dispose of the price or prices or consi-
'deration to be received on the sale and alienation of the said
'lands and others, or any part thereof, in such way as he may
'think proper, and he intends to do so accordingly;' he there-
fore concluded that it should be found and declared, that he
'has full and undoubted right and power to sell and alienate the
'several lands, &c. contained in the two deeds of tailzie before
'mentioned, in any way he may think proper, for a fair price or
'other onerous consideration; and that the pursuer has full and
'undoubted right and power to grant and execute all dispositions,
'&c. which may be requisite or necessary for effectually convey-
'ing the whole or any part or parts of the said lands and others
'which may be so sold and alienated; and that the pursuer is
'not prevented from selling and alienating in any way he may
'think proper, for a fair price or onerous consideration, the lands
'and others before mentioned, nor from granting and executing
'the dispositions and others before mentioned by the foresaid two
'deeds of tailzie, or either of them, or by any of the titles under
'which the pursuer possesses the foresaid several lands and others.
'And further, that upon selling or alienating the whole or any
'part or parts of the said several lands or others contained in the
'said two deeds of tailzie, for a fair price or other onerous consi-
'deration, the said Frederick Campbell Stewart, pursuer, has the
'sole, full, and exclusive right to the price or prices or consider-
'ations thereof; that the same are the pursuer's absolute pro-
'perty, and that he has full power to use and dispose of the same
'at his pleasure; and that the pursuer does not lie under any
'obligation to invest, employ, or lay out the same, or any part
'thereof, in the purchase or on the security of any other lands or
'estates, or otherwise, for the benefit of the said heirs-substitutes
'of tailzie, or any of them; and that the said heirs-substitutes of
'tailzie before named, or any of them, have no right or title to
'interfere with or control the pursuer in the use or disposal of
'the said price or prices or considerations to be received by him
'in any manner of way; and also that the said heirs-substitutes,
'&c. have no claim or demand of any description against the pur-
'suer, or against his heirs and representatives in the event of the
'pursuer's death, for or in respect of the sales or alienations which
'may be made, or dispositions or other writings which may be
'granted or executed by the pursuer, in the manner and on the
'terms before specified, or for or in respect of the pursuer's using
'or disposing at his pleasure of the said price or prices or consi-
'derations to be received as aforesaid.'

During the dependence of this action, the pursuer sold part of

the lands to Mr. M'Gregor, writer in Glasgow, who brought a suspension on the ground of the doubts as to the power of the pursuer to sell the lands; and the defender, Mr. Fullerton, (one of the heirs-substitutes,) raised a counter action, in which he concluded that it should be found 'that the said Frederick 'Campbell Stewart, having sold and alienated the foresaid lands 'and others contained in the said two deeds of tailzie, the price 'or prices or considerations received therefor belong to the 'said Stewart Murray Fullerton, and the other substitutes called 'by the said two deeds of tailzie, and not to the defender, to 'be used by him for his own private purposes; and that the 'said defender has not the power to use and dispose of the same 'at his pleasure: And further, that the said Frederick Camp-'bell Stewart, defender, is bound to reinvest and lay out the said 'price or prices or considerations, and whole parts and portions 'thereof, in the purchase of other lands and estates, for the be-'nefit of the pursuer and the other substitutes called alongst with 'him under the said two deeds of tailzie, and all of them; and 'that the said pursuer has good right and title to prevent the 'defender from using and disposing of the said price or prices 'or considerations so received or to be received by him, the said 'defender, from the purchasers of the said lands and others, to 'his own advantage: And also, that in the event of the defender 'not reinvesting the price or prices or considerations received 'or to be received by him for the lands and others acquired and 'possessed by him under the foresaid two deeds of tailzie, in the 'purchase of other lands and estates, to be taken to the pursuer 'and the other substitutes as aforesaid, the said Stewart Murray 'Fullerton, and each and every one of the other substitute heirs 'of tailzie under the foresaid two deeds of tailzie, have all and 'each of them legal claims and demands against the said Fre-'derick Campbell Stewart, defender, or against his heirs and re-'presentatives in the event of the defender's death, for damages and 'pecuniary reparation, to the extent of the price or prices or con-'siderations received or to be received by the said defender for 'the sale of the said tailzied lands and others, for and in respect 'of the said sale or sales or alienations which have been made 'and executed, or which may yet be made and executed by the 'defender, and for and in respect of the said defender using and 'disposing of the said price or prices or considerations received 'or to be received as aforesaid, to his own exclusive advantage.'

The Lord Ordinary having reported the case to the Court, and that of Stewart against Lockhart, involving the same point, having been remitted by the House of Lords for reconsideration,

their Lordships ordered a hearing in presence before the whole Court.* In regard to the pursuer's power to sell to a third party for an onerous cause, there was no dispute; and the sole point therefore came to be, whether he was bound to reinvest the price so obtained in other lands, and to take the titles under the fetters, and in terms of the entails.

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* The case of Stewart against Lockhart has, it is believed, been compromised. On remitting it, the Lord Chancellor made these observations:—

"It has been long and repeatedly settled by decisions of the Court below, and of your Lordships, that where there is only a prohibition from selling in a deed of entail, and such prohibition not fenced by irritant and resolutive clauses, the heir of entail may sell. Scarcely a month passes, in which we do not hear this doctrine stated and assented to.

"In many of these cases it appears that the sale was strenuously opposed; yet it is strange, where so much property was at stake, that these cases had not been followed up by some proceeding enforcing the laying out of the price, and that this point also should not long ago have been at rest. Yet it appeared that in this cause the question was learnedly discussed, and only carried on the Bench by the narrowest majority against the appellant. The person, too, who gave his casting voice in favour of the respondents, thought the question a very doubtful one; but he deemed it right to rest upon a former case, in which, however, he did not think the point had been minutely discussed.

"We have very little help, therefore, from decisions in Scotland. In this country, if a person make a voluntary settlement of an estate, he may nevertheless sell it for a valuable consideration; but, unless he has reserved a power of altering, he cannot revoke the former voluntary settlement.

"In Courts of Equity in England, when this matter was discussed, it was said to be strange that, if he sold, the price should be his own, and yet that equity should prevent him from gratuitously altering the former settlement; and it was contended that the same equity should attach upon the price. But it was solemnly decided that equity did not interfere in regard to such price.

"What the precise principle was, upon which this point was decided, it is difficult to say; but it has been considered, that where there is a legal power to sell, the most convenient doctrine is to hold that the voluntary settlement should neither bind the purchaser nor the price.

"There is another class of cases in our law which have some relation to the present,—those of quasi tenants in tail of estates held for lives. Where a mere tenant for life takes a renewal to himself, it is subject to the same trusts as the former estate; but in the case of a quasi tenant in tail, if he takes a renewal to himself, he holds the estate discharged of the trust, and is not bound to those in remainder.

"Here there is this difference between that class of cases and the present, as it has been decided in the Court below, that here, though you may sell, yet, sell as often as you will, you must, if you make a new purchase, have it settled to the same uses as before.

"I have looked upon this as a case of great difficulty, and of great importance. I have looked for decided cases, and for opinions of text writers, but I have found nothing to guide us to a decision on this very important point. I have considered it best, therefore, to recommend to your Lordships to remit this cause to the Court below, and to direct the Division to which it belongs to take the opinion of the other Division.

"I am quite confident that the House would proceed with a degree of rashness, were they finally to decide this important question as it stands at present. We ought previously to obtain all the information thereon which we can have."

On the part of the pursuer it was maintained,

1. That as he was feudally vested in the fee, he was entitled to the absolute property, so far as he was not effectually fettered; and that if he was so entitled to the absolute property of the lands, his right must be equally as extensive when they were converted into money; that if he could not be prevented from disposing of the property, there was no consistent principle on which he could be restrained from disposing of the price; but as it was admitted that he could competently sell the lands, and receive the price, there was no obligation by which he could be compelled to reinvest it in land.

2. That although there was a prohibition in the entail against selling, yet there was no express obligation, that if the lands were sold, he should be bound to reinvest the price in other lands; that it was a settled rule, that no restriction or obligation could be raised up by implication in an entail, even in a question inter hæredes; that, indeed, if such an obligation had been introduced, it would have been ineffectual, as being a feudum pecuniæ; and that, consequently, it could not receive greater effect, where it was merely said to be implied.

3. That it was demonstrated that there could be no existing obligation, from the circumstance of the incompetency of protective diligence by inhibition or interdict; because, wherever there was an obligation either to do or not to do a particular act, the law would interfere to give effect to it by such diligence; so that it was plain that there was here no obligation which could be enforced; and that although it was true that diligence was not granted in relation to marriage-contracts, or to obligations to marry, or to those between master and servant, yet this arose from the peculiarity of those contracts, and from the necessity of maintaining paternal authority and perfect freedom; that it was admitted that the alleged obligation could not give any claim of damages, and that the argument that the price must be held as a surrogatum for the lands, was a mere petitio principii, seeing that the very question was, whether the pursuer was entitled to dispose of that price or surrogatum; and,

4. That as this was an entail under the statute 1685, it was not possible to enforce it, except by virtue of that statute; and that, if the provisions of that statute were not sufficient, a restriction could not be introduced by an implied obligation to reinvest, or by any other means whatsoever.

On the other hand, it was contended for the heirs of entail,

1. That the general principle regulating the whole practical application of the law of entail was the absolute effect of the will

of the entailer, as explicitly declared in the deed of entail, in fixing the rights and obligations of the parties, in so far as those rights and obligations were capable of being affected by an entail at all; that, in construing an entail, each restrictive clause was entitled to independent effect; and that as, on the one hand, fetters omitted could not be reared by implication from the entailer's intention, as presumable from those which were inserted in the deed, so, on the other, the legal effect of restrictions which were expressed, could not be impaired by the entailer's neglect of some of those precautions necessary for rendering the entail complete; that, by the terms of this entail, the pursuer had right only to the estate on the condition of observing and giving effect to all the provisions therein contained, whereby he came under an obligation to do so; that there was a clear prohibition against selling, which created against him an obligation not to sell, and a jus crediti in favour of the heirs-substitutes to enforce that obligation, the existence of which jus crediti was shown from their having a right to pursue actions on the statute 1621;—that although the entailer had omitted to direct the usual penalties against the violation of that obligation, yet the obligation itself, and the jus crediti of the heirs, did not thereby cease to exist; that, consequently, the conclusions of the pursuer's summons, that he was under no obligation not to sell, could not be supported, but, on the contrary, must be rejected; and the conclusion of the defenders, that if he did sell, he was bound to reinvest, must receive effect.

2. That the defenders did not maintain that an obligation not to sell, or, if he did sell, to reinvest, should be implied; but what they contended for was, that the prohibition, and consequent obligation not to do so, should receive *effect* in the only mode in which it could be done; that they did not demand payment of damages in money, but reparation, by reinvesting the proceeds in land, and that if it was established that there was an obligation not to sell, this was the only way in which reparation could be given for the violation of it.

3. That although it was true that they could not prevent the pursuer, by inhibition or other protective diligence, from selling, yet this arose from the peculiarity of an entail, because, if it were defective in the irritant and resolutive clauses, any one might purchase, notwithstanding that diligence; but it did not therefore follow that there was no obligation, nor consequent liability for reparation; and that accordingly, although it was admitted that where there was an obligation in a marriage-contract for a father to provide his estate to his son, yet the latter could not prevent him from selling; and in like manner, although a party had bound

himself to marry a particular woman, she could not prohibit him by diligence from marrying another, but could only get damages; so the circumstance of protective diligence being incompetent was no test of the existence of the obligation, to the effect of giving reparation; and,

4. That the provisions of the statute 1685 were not intended to regulate questions inter hæredes, or to deprive them of their rights arising from the obligation of the heir in possession, but had reference to the public alone.

The Court, after obtaining the written opinions of the other Judges, pronounced this interlocutor:—'In the process of suspension, find, That as the provisions of the act 1685, c. 22, 'which regulates all questions with purchasers or creditors 'contracting with heirs of entail, have not been observed or complied 'with, so far as regards sale and alienation, to which the irritant 'and resolutive clauses are not applicable, and that the prohibitory or restraining and limiting clause cannot per se affect 'the purchaser,—repel the reasons of suspension, find the letters 'orderly proceeded, and decern: but, in the declarator at the instance of Frederick Campbell Stewart of Ascog, find that the 'pursuer is infeft and seised in the estate of Ascog and others, in 'virtue of two deeds of entail, under a provision by which it is 'declared that the heirs of entail shall not 'have any power or "liberty to sell, annailzie, or wadset the lands and others fore-"said, or any part thereof,' and that the same is effectual and 'obligatory against the said pursuer, and that he has no right to 'contravene the same; and therefore assoilzie the defenders from 'the whole conclusions of the said action, and decern: And in 'the declarator at the instance of Stewart Murray Fullerton, 'Esq. of Fullerton, and others, heirs of entail to the estate of 'Ascog and others, find that the said pursuers have, under the 'foresaid provision or restraining clause, a right to compel the 'defender, Frederick Campbell Stewart, and that the said de-'fender is bound, to reinvest and lay out the price or prices or 'considerations of the lands sold by him contrary to the said pro-'vision or restraining clause, in the purchase of other lands or 'estates, to be settled, for the benefit of all concerned and interest-'ed in the said two entails, conformably in all points to the pro-'visions and conditions therein contained, and according to the 'forms and practice of the law of Scotland; and find that the de-'fender is not entitled to apply or use the principal sums of the 'said prices or considerations to his own private purposes, bene-'fit, or advantage; and decern.'

Against this judgment the pursuer presented a petition, on

advising which with answers, and after remitting them for the consideration of the other Judges, who stated that they remained of their former opinions, the Court adhered.

LORDS JUSTICE-CLERK, GLENLEE, ROBERTSON, PITMILLY, MEADOWBANK, MACKENZIE, and MEDWYN, delivered this opinion :—

Frederick Campbell Stewart succeeded to the estate of Ascog in virtue of an entail. The irritant and resolutive clauses, while they apply to the other prohibitions, being silent as to the prohibition against selling and annailzieing, he raised a declarator to have it found and declared that he 'has full and undoubted right and power to sell and 'alienate the several lands, mills, teinds, fishings, and other subjects' contained in the deed of entail; 'and further, that it should be found 'and declared, that upon selling or alienating the whole, &c. for a 'fair price or onerous consideration, the pursuer has the sole and 'exclusive right to the price or prices or considerations thereof; that 'the same are the pursuer's absolute property, and that he has full 'power to use and dispose of the same at his pleasure; and that the 'pursuer does not lie under any obligation to invest, employ, or lay 'out the same, or any part thereof, in the purchase or on the secu-'rity of any other estate,' &c.

A sale having been made of a portion of the estate, the purchaser also presented a suspension for the purpose of trying the right of the seller.

As the question is one of some difficulty and of great importance, we consider it proper not merely to give our opinion, but to detail the grounds on which it rests.

I.—As to the Suspension.

The act 1685, c. 22, having been passed for the purpose of regulating every question between third parties, whether purchasers or creditors, contracting with heirs of entail, as the provisions of the act have not been complied with, so far as regards sale and alienation, to which the irritant and resolutive clauses are not applicable, we can have no doubt that the sale is good so far as regards the purchaser, and that his suspension should be refused.

II.—As to the Declarator at the instance of the Heir.

We are of opinion that the act 1685 is the code by which the rights of third parties are regulated. But we hold that what was the common law of Scotland before that statute was passed regulates questions among heirs, and that entails containing only a simple destination or a prohibitory clause are still effectual inter hæredes, according to their nature.

It need scarcely be observed on this point, that if a simple destination in a tailzie remain unaltered, it will regulate the succession, and the heir of provision will succeed to the prejudice of the heir of line.

But it is more material to attend to the operation of a tailzie with prohibitory clauses, merely in questions among heirs.

We are of opinion,—1. That the substitutes under an entail with prohibitory clauses have a jus crediti, which cannot be defeated by any gratuitous deed. 'The obligation upon them not to alien or 'contract debt, when it is not strengthened by irritant and resolutive 'clauses, is only personal against them and their heirs, but does not 'affect creditors or purchasers;' Erskine, b. iii. tit. 8, § 23. Or, to quote from the Annotations on Stair, p. 110, (which is evidently the work of an acute and intelligent lawyer,) 'It is clear that if there be 'no irritant and resolutive clauses in the charters and sasines, this 'clause,' (the case put is a prohibitory clause against altering the succession or contracting debt,) 'even though repeated in these writs, 'is no more than a personal obligement, and will not affect singular 'successors for onerous causes, and that especially now since the act '1685, whereby none of these tailzies are effectual against singular 'successors, except such as contain irritant and resolutive clauses.'

Hence, if an entailer prohibit his heirs from contracting debt, or from selling the estate, and if the heir take the estate under that provision, and notwithstanding contracts debt or dispones, the creditor or disponee is safe, because the heir was fiar of the property, and the provisions of the act 1685, so as to affect third parties, have not been complied with; but if the heir attempt to defeat the prohibition by any gratuitous act, the substitute heir under his jus crediti may set such gratuitous deed aside.

It was held, immediately after the act 1685 passed, (so little was it then considered that an heir of entail has no other remedy but in virtue of that act,) that a clause prohibiting the disponee and substitutes from doing any deed which might affect succeeding heirs was a sufficient ground for the next heir, or one who on a bond had adjudged from him, 'to reduce, on the act 1621, any posterior gratui-'tous or voluntary deeds not depending on prior onerous causes, 'though it wanted a clause irritant, for that would resolve, irritate, 'annul, and reduce even onerous creditors' debts;' E. of Callender, 27th January 1687, Fount. This right in the substitute is universally recognised; Mackenzie, Vol. II. p. 325 and 487, edit. 1722; Stair, b. ii. tit. 3, § 59, in fine; Bankton, b. ii. tit. 3, § 139; Erak. b. iii. tit. 8, § 23; Craik against Craik, 29th January 1735. This was indeed admitted in the pleadings by the pursuers' counsel, and it appears to be beyond question.

2. To make an entail effectual against third parties, it must be recorded in the register of tailzies; yet an heir of entail cannot found upon the omission of that solemnity as a defence in any action for contravention at the instance of a substitute. He is bound by the limitations in the right by which alone he holds the estate, and an heir-substitute has a jus crediti entitling him to enforce the obligation, although that provision of the statute has not been complied

with. This point seems first to have occurred in the case of Leslie against Dick of Grange, 15th December 1710, Fount.; but there was no room for deciding it there. It was, however, decided in Willison against Callander of Dorrator, 26th February 1724, Kames; also in Hall against Cassie, 17th February 1726, in which it was found that 'tailzies are good against heirs without registration, but 'not against creditors.' In a question with a widow the same has been found, that irritant and resolutive clauses, and consequently registration, are unnecessary to make entails effectual intra familiam of the substitutes; Gibson against Ker of Hoselaw, 24th November 1795, also reported in Bell's Cases, 5th June 1795; Makgill against Makgill, 13th June 1798; Duchess of Roxburghe against the Duke, 11th January 1820.

3. To make an entail effectual against third parties, it must be recorded; but any substitute heir may apply to the Court of Session to compel the heir of entail to produce the deed, in order that it may be recorded. This arises from the jus crediti which the substitute has under the entail, although at the same time it is ineffectual, while not recorded, against creditors or purchasers; Ersk. b. iii. tit. 8, § 26. and 27; Nairne against Sir T. Nairne, 10th March 1757; Ker against Duke of Roxburghe, 7th July 1804.

4. Where an heir, besides being heir of entail, is also heir of line, the substitute heirs of entail have a jus crediti to entitle them, and have an interest to pursue measures for compelling the heir in possession to expede charter and sasine upon the entail, and to possess under those deeds; and if they neglect to use this jus crediti, they will be excluded by prescription; Macdougal against Macdougal, 10th July 1739; Maule against Lord Dalhousie, 1st March 1782. But it is obvious that the provisions of the act 1685 not having been yet complied with, the tailzie is ineffectual under that act, so far as third parties are concerned.

What we have now stated being points of settled law, we are of opinion that they afford conclusive evidence that an entail, though not completed under the statute 1685, is nevertheless effectual inter hæredes; and if so, it is impossible to assign any reason why an entail with a clause prohibitory should not be effectual inter hæredes, since it is only with a view to third parties that clauses irritant and resolutive were invented, or ever were supposed to be necessary. And again, if an entail with clauses prohibitory be effectual at all inter hæredes, and not absolutely null, or operative only as a simple destination, it can operate in no other way than by producing an obligation and jus crediti. No other mode or principle of operation has ever been assigned; and, in the present case, the existence of obligation arising from the prohibition was distinctly admitted by the counsel for the pursuers—it was a point, indeed, which they could not dispute, although they endeavoured to limit that obligation so

as to give it no higher effect than a simple destination, and therefore to render it not availing against the pursuers' pretensions.

It is true that when an estate is held under an entail, with a prohibitory clause only, or when, from any other cause, the entail has not the protection of the act 1685, although the jus crediti of the substitute heir will enable him to defeat any gratuitous deed to the prejudice of the tailzie, yet as the heirs of entail in possession continue fiars, if they grant deeds for onerous considerations, these will be effectual to third parties contracting with them; for the obligation against the heirs not to alienate or contract debt is merely personal, and cannot affect creditors or purchasers, whose rights can only be affected by an entail under the act 1685. Thence arises the question, whether, in the case of contravention by an onerous deed, the substitute has any claim against the heir contravening?

We are of opinion that the jus crediti in the substitute heirs, which, as to gratuitous deeds, entitles them to set such deeds aside, gives a claim against the heir or his representatives to have the price reinvested, if the entailed estate has been sold, contrary to the prohibition of the maker of the entail; or to have it disencumbered of debts, if such have been contracted contrary to a prohibition, and it has been burdened with them.

We find traces of this from as early a period of our law as could have been looked for, as it does not appear that an entail with a prohibitory clause was much known till about the beginning of the 17th century; and the temptation to defeat the provision and the interest to resist it would probably not emerge for some time, and would arise only on the existence of an heir of line not being an heir-male, in whose favour the tailzie was altered; or in the case of a contraction of debt where the heir of entail did not also represent the predecessor in any other character.

In the report of the case of Drummond against Drummond, 3d February 1674, by Gosford, this statement of the law is made:—'That albeit in tailzies, where there is no clause irritant, the acquirers 'for a just and adequate right cannot be quarrelled; yet there being 'an obligement in the tailzie, that it shall not be lawful to any of 'the heirs who succeed to annalzie and dispone in prejudice of the 'next person who is substitute in the tailzie, the same furnishes an 'action against the first disponer for damage and interest, and the 'person substitute or his heirs who are prejudged, albeit they cannot 'succeed to the land, yet they will have a personal action super 'pacto de non alienando against the disponer and his heirs, as is 'clear by Hope in his Compend., where he treats of the nature of 'the tailzies of land.'

The point, however, did not occur for decision in that case, and Gosford accordingly remarks, that the point was not decided.

The annotator on Stair, who wrote prior to the year 1725, observes, p. 114:—'The next case therefore may be—If tailzies con-

'tain provisions that the heirs shall not sell nor dispone any of the 'lands nor contract debts, nor do deeds whereby the tailzie may be 'frustrate or irritate, and that all such deeds shall be null and void, 'but contain no irritant clause of the contravener's right in case these 'debts are contracted? There seems no question in that case that 'the clause not to alter or contract debts would be valid and effectual 'against the contravener and his other heirs, to subject them to the 'reparation of the heirs of tailzie's damages by the contravention, 'not only from what has already been said, but likewise from the 'act 1685, whereby a person may substitute heirs to himself with 'what conditions and provisions he pleases.' In the case supposed, it need scarcely be remarked that the insertion of an irritant clause, which could not be effectual against the creditor, makes no difference as to the heir, and could not strengthen the effect of the prohibition.

The point was first in terminis decided in the case of Lord Strathnaver against the Duke of Douglas, 2d February 1728, where there was a simple prohibition against contracting debt. An heir having contracted debt, his representatives were found liable to disburden the entailed estate, on the ground that he was bound to fulfil the conditions imposed on the grant, and under which he had accepted the gift.

Although the judgment in this case contains a finding on another point of law which has not been followed in subsequent cases, the point at present under consideration is not connected with that finding, and it, on the contrary, has been confirmed. Accordingly, when the question again occurred in the case of Cumming Gordon of Pitlurg, 29th July 1761, the principle established in the case of Strathnaver was adhered to. There the pursuer brought an action having two conclusions, for declaring that he had power to sell the estate, and that he should be at liberty to dispose of the price at his pleasure; and his argument was founded on this, that there were no words in the prohibitory clause expressly prohibiting sales, and that it was only from construction that such prohibition was inferred. There was no irritant clause in that entail.

The interlocutor of the Lord Ordinary Alemore, 1st July 1761, applies strictly to both conclusions of the declarator. Mr. Miller, afterwards Lord President, who wrote the reclaiming petition against this interlocutor, after laying it down that there is no express prohibition, argues, 1st, That the clause does not imply a constructive prohibition against sale; and, 2d, That if it did, such would not be sufficient to supply the want of express words. He concludes his argument in the words which were read by the counsel for the defender, in which this eminent lawyer did not venture to dispute the conclusion, that if there was a prohibition, the heir of entail on contravention was liable in reparation to the substitutes.

This decision was followed by the case of Sutherland against Sin-

chairs and Baillie, 25th February 1891. The entail in that case contained a prohibition against contracting debt, and an irritancy of the heir's right on contravention, but no irritancy of the debts. Here it is plain that a resolutive clause alone could not make the prohibitory clause stronger than it would have been without it. Debts were contracted by the heir in possession, and the entailed estate was adjudged and sold by the creditors. The next heir stating it 'as a clear point, that an heir of entail has a claim against the repre-'sentatives or separate estate of preceding heirs for relief of the da-'mage he has sustained through the entailed estate being either 'totally evicted or improperly burdened,' brought an action to have it found that he was a creditor to the extent of the price at which the estate was sold, and that the executors of the heir should be liable for the amount. This was found accordingly. The reclaiming petition argues the case fully, but no attempt is made to dispute the conclusion that reparation is due, if a prohibition has been contravened; and the bent of the argument is to show that the prohibition is not applicable, or that the heir is not in a condition to found upon it.

These cases show pretty clearly that the law was held to be fixed, more especially as no contrary one can be cited; and we have reason to believe, that opinions by the most eminent counsel at the Bar were given in conformity therewith, and that the same has been publicly taught and understood as law in Scotland. It is held by the late Lord Meadowbank, in 1815, as a fixed point, in the opinion delivered by his Lordship in the case of the Earl of Wemyss.—Fac. Coll. p. 274.

The question again occurred in the case of Sir James Stewart against Lockharts, 11th June 1811. It was held that under the prohibitory clause the substitutes had a jus crediti which could not be defeated by any voluntary deed; and that although a purchaser was safe, the heir in possession was bound to reinvest the price of the lands, although it might be afterwards carried off by onerous creditors; and the report bears, that 'the majority held that the point 'was already fixed by the decisions.'

The same decision was also given in the case of the Earl of Breadalbane against Campbell of Monzie, 12th June 1812.

The case of Sir James Stewart, having been carried by appeal to the House of Lords, was remitted in consequence of doubts entertained of the soundness of the principles on which it had been decided; and although no proceedings have since taken place under that remit, these doubts have naturally called upon us, with the most minute attention, to consider the grounds which induced our predecessors to hold, that under an entail with a prohibitory clause merely, or where the provisions of the act 1685 have not been followed out, a contravention of a prohibition, though effectual to a third party,

may be made the foundation of a proceeding against the contravener himself, or his heir or representative.

On considering the objections stated to the view of the law taken by us, it appears,

1. That the act 1685 did not, and was not meant to supersede every other form of entail, except the strict one which is effectual against third parties.

This we think established by the following considerations arising out of the history of entails in this country.

The first form of entails was that which contained only a simple destination, and is the only form of entail noticed by Balfour, p. 174. It could be put an end to at pleasure by the joint will of the superior and vassal. The subsequent heirs had no more than a spes successionis.

Attempts were at an early period made to limit the power which the vassal had, in concurrence with the superior, to defeat the rights of the substitute heirs. This was first attempted by the fiar imposing personal obligations upon himself in favour of his heir. Of this two remarkable instances are to be found, one noticed in the Acta Dom. Concilii, 17th October 1478, and the other in the Acta Dom. Audit. 7th June 1493.* Such contracts are also noticed by Dirleton, pages 87 and 198, and instances of such are referred to in the cases of Sharp against Sharp, 14th January 1631, and Ure against Crawfurd, 17th July 1756.

2. Next it was attempted to limit all the subsequent heirs by laying each in succession under such prohibitions as the entailer thought proper, as to altering the succession, selling, or contracting debt. Such clauses were introduced in the time of Craig; but their validity had not been tried, and he seems to doubt their efficacy, in the case at least of a feu granted to heirs and assignees, L. ii. D. 5. sect. 7. But such doubts do not seem well founded. In the words of Lord Kames, 'It is plain that every single heir who accepts the succession 'is bound by the prohibition, so far as he can be bound by his own 'consent. His very acceptance of the deed, vouched by his serving heir and taking possession, subjects him to the prohibition, for 'justice permits no man to take benefit by a deed without fulfilling 'the provisions and burdens imposed upon him in the deed.'—Law Tracts, p. 145. But although the prohibition bound the heir, and all those who contracted with the heir titulo lucrativo, so that gratuitous deeds were prevented; (against which also, as has been adverted to, the provisions of the act 1621 have been found to be applicable,) it was insufficient to affect those who contracted onerously with the heir; so that, with a view to strengthen the effect of this

* Recently printed under authority of the Commissioners for printing the Parliamentary Records of Scotland.

clause by publishing it to the world, inhibition was used upon it, and by this it was attempted to make it effectual against third parties. But it was found 'that there may be many ways by which this pro-'vision may be frustrated.'—Minor Practics, voce Tailzie, sect. 364, edit. 1726.

3. 'To prevent and remeid this, there is a new form found out,' says Sir Thomas Hope, who wrote about the year 1635, 'which has 'these two branches, viz. either to make the party contractor of the 'debt to incur the loss or tinsel of his right in favour of the next in 'tailzie, or to declare all deeds done in prejudice of the tailzie by 'bond, contract, or comprising, to be null of the law.' Ibid. sect. 367. The object of these clauses was not to make the prohibitory clause binding upon the heirs, which was not then doubted, but to make it effectual against third parties; and their effect came first to be tried in the case of Stormont, 1662, when a tailzie with a resolutive clause was held to be effectual against creditors; but the doubts entertained of that decision, and the desire to validate entails against purchasers and creditors, led to the act 1685, c. 22, by which, if the conditions and provisions of an entail are affected by clauses irritant and resolutive in the investiture, and published in the register of tailzies, they are declared 'to be real and effectual not only against 'the contraveners and their heirs,' (about which there was not any dispute,) 'but also against their creditors, comprisers, adjudgers, and 'other singular successors whatsoever, whether by legal or conven-'tional titles.'

That the purpose of this act was merely to make entails effectual against third parties, Sir George Mackenzie, who is generally supposed to have framed the statute, declares in positive terms; for after giving an account of the decision in the case of Stormont, he adds, 'To strengthen these clauses against singular successors, by making 'them more authoritative and better known, there was an act of 'Parliament made anno 1685, whereby such clauses were declared 'valid against singular successors, providing they be set down,' &c. Mackenzie, vol. ii. p. 149. See also at p. 325, sect. 2, 3. And in like manner Lord Stair, who was Lord President of the Court at the time, says, 'By act 22. of Parliament 1685, clauses irritant in 'tailzies are approven as effectual against creditors and singular suc-'cessors, being once produced before the Lords and approven by 'them, and the original tailzie being registered in a separate register 'for that purpose, and being repeated in all the successive sasines.' Stair, b. ii. tit. 3, sect. 58.

If, from the date of the passing of this act, it was the meaning of the Legislature that an entail was to be altogether ineffectual, even inter hæredes, unless all the requisites of that act were complied with, Lord Stair could not have failed to have altered, in the edition of his Institutes published in 1693, what he had laid down on this subject in 1681, b. ii. tit. 3, sect. 59. Sir George Mackenzie, in like man-

ner, would not have treated of entails in the way he has done, vol. ii. p. 325; nor would Erskine, b. iii. tit. 8, sect. 22, have classed entails into three kinds, 'when considered with regard to their several de-'grees of force.' Moreover, this last author subsequently lays down the law thus:—'Entails may be in many cases effectual against the 'heir of the granter, or against the institute who accepts of it, which 'cannot operate against singular successors.' B. iii. tit. 8, sect. 27. Indeed, it seems quite impossible to dispute the proposition that obligations under an entail with a prohibitory clause are effectual against heirs, if it be admitted that it founds a reduction of a gratuitous deed of contravention under the act 1621; and this point must be disputed, and the right to reduce disproved, before effect can be denied in a question among heirs, to an entail so constructed, on the ground that it has not been completed under such a form as will make it effectual also against singular successors.

Nay, in a question with creditors, it was at one time found by the Court of Session, 'that the prohibitory and irritant clauses in a per-'sonal right were not effectual against creditors, when not recorded 'in the register of tailzies, on this ground, that the statute 1685 '' was a total settlement of the whole system of entails' in such questions; 'but the House of Lords put a more limited construction on 'the statute, as only concerning tailzies upon which infeftment had 'followed,' (Kilkerran, p. 546,) in the case of Baillie against Stewart Denham in 1731; and this has been held as law ever since; Creditors of Carleton, 21st November 1753; Chisholme, 27th February 1800. So that, in one case at least, an entail will be effectual even against creditors without the aid of the statute.

II. We do not consider it as a proof that there is no obligation, no jus crediti under such a deed, because it has been held that inhibition cannot be used upon it.

For, 1. that there is a jus crediti, to a certain extent at least, is unquestionable, otherwise reduction on the act 1621 would not be competent, for the title to pursue is the being a creditor of the person whose deed is to be set aside. As already noticed, this is admitted.

2. It has also been held that inhibition cannot be used by the heir of a marriage to secure the provision contained in the contract of marriage; Gordon against Sutherland, 3d January 1748. Neither can any interdict be obtained against a father selling the lands; Cunnyngbame, 17th January 1804; and yet it cannot be disputed that the heir of a marriage has such a jus crediti as will entitle him at the death of the father to the price of the lands settled on him by the contract, which, as far, the father has it in his power to sell; Cunningham of Bowerhouses, 20th December 1810; E. of Wemyss, 28th February 1815.

We consider the use of inhibition, in order to enforce a prohibition against third parties, has been virtually superseded by the act 1685, which declares that no tailzie shall be effectual against third

parties except when completed and published in terms of that statute; and therefore to attempt to enforce any such obligation against the heir in possession by inhibition is obviously inept, as it would in effect be constituting an entail against the person inhibited, as strictly as if the prohibitory clause had been fenced by irritant and resolutive clauses, and recorded in the register of tailzies. But although this cannot be done, it seems impossible from this to infer that no obligation arises from a prohibitory clause against the heir himself, because it cannot by using inhibition be made effectual against onerous creditors.

And upon the same view of the law we conceive was founded the refusal to grant an interdict against the heir, even when it did appear that he intended to violate the prohibition, which occurred in the case of Sir James Stewart already mentioned. At any rate, it is certain that that refusal could not have proceeded from an opinion that the prohibition did not constitute any obligation, since there the Court found that the heir was bound to reinvest the price.

III. Neither do we think, because the act 1685 puts it in the power of an entailer to execute a strict entail, by which the prohibitory clause may be effectually fenced against third parties, that if he does not take the benefit of this act, the legal effect, which, prior to that act at least, was consequent on the deed he has executed, is not now to follow. The heir under a simple destination will unquestionably succeed, if it be not altered; and an entail with a prohibitory clause will be effectual, unless where the subject of it has been disponed for an onerous consideration; and a gratuitous alteration will even be voided. But the irritant and resolutive clauses have no operative effect in themselves independent of the prohibitory clause, which is the limiting or restricting clause, while the object of the other clauses is only to make these limitations and restrictions upon the heir's right effectual against third parties. That the maker of an entail has not availed himself of his right to insert irritant and resolutive clauses, is probably an unintentional omission on his part; but even supposing it otherwise, this only can be inferred from it, that he did not mean to prevent onerous transactions with third parties, leaving their effects, so far as heirs are concerned, entire. That he might have tied up his heirs more than he has done, is no reason why effect should not be given to the restrictions he has imposed.

IV. It is further objected, that the avowed object and intention of the entailer in the present case was to secure the estate of Ascog to his heirs, and not to entail upon them a sum of money, or a separate estate purchased with the price of Ascog; that to reinvest the money is not fulfilling the intention of the entailer in terms of the deed out of which the obligation is said to arise, and that to infer such an obligation from the prohibition to sell, is violating the rules of strict construction, which ought to be applied to entails as restraints upon property.

The doctrine of strict construction we fully admit, and from this it arises that no fetters are to be imposed from implication or inference, or any clause which is usually made use of in creating a limitation supplied, although the omission be obviously through inadvertence, and by mistake. But when limitations, after applying the doctrine of strict interpretation, are found to exist, these limitations are to be construed according to the usual and legal import of the words, and according to the meaning affixed to them by the entailer. Upon this ground were decided the case of the competition for the estate of Cumbernauld, 19th January 1804; the case of the Roxburghe feus, 11th January 1808; and the cases of the Queensberry, 21st February 1816—Turnerhall, 6th December 1811—and Stobbs leases, 10th March 1814,—all of which, except the first, have also been decided in the Court of the last resort. Now it appears to us, that as the prohibition to sell in the present case is the declared will of the entailer, although he has not fully and absolutely provided for specific implement by using the statutory means, whence it arises that onerous sales must be effectual, still we do not see why the legal consequence of contravening such a prohibition, according to the solemn detemination of the Court, just two years before the present entail was made, which was in 1769, should not have effect. Hence to make the heir reinvest the price, is not implying any condition or restriction not imposed by the deed; on the contrary, it is giving legal effect to the prohibition contained in the deed.

The same takes place on the breach of the obligation for settling the estate on the heir of a marriage: if it be sold by the father for an onerous consideration, the sale is good; but if any part of the price remain unspent at his death, the heir is entitled to it, although he by this does not get specific implement of the obligation, namely, the estate.

V. Even although it should be held that an heir succeeding under an entail with all the clauses pointed out in the act 1685, and duly recorded in terms of that act, can do no more than irritate deeds in contravention of the entail, and has no claim for damages or reparation, (upon which we offer no opinion, as the case is not before us,) it would not affect the present question. For if an entail with prohibitory clauses merely raises an obligation against the heir, although it be ineffectual against third parties, that the entailer might have imposed upon his heir a prohibition with a different mode of enforcing it, does not seem to us to alter or impair the right which arises out of the prohibition as it stands. Besides, the refusal of damages for an attempt to alienate, when the alienation is not effectual, but void as ultra vires, and the refusal to give redress for an alienation actually made and effectual, though done contrary to an obligation in favour of the heir, seem to rest on very different grounds; and hence the decision given by the House of Lords in the case of the Queensberry leases, 10th March 1824, does not affect the

views we entertain. For the present question neither did nor could arise there; that being the case of an heir who, under the statute 1685, had set aside the deeds of contravention, and where what he claimed was damage suffered by himself individually, which, if due, was due solely to himself, and was not to be reinvested for the benefit of the subsequent heirs; and it arose, because, either from his delay in bringing the action, or from the necessary procedure for setting aside the deeds of contravention, damage beyond what the remedy under the statute would repair was said to have arisen to him individually.

We are therefore, upon the whole, of opinion, that while the sale must be effectual to the purchaser, because the prohibition to sell has not been guarded in terms of the act 1685, yet, as the entailer declared that the heirs should 'not have any power or liberty to 'sell,' the pursuer has done what he had no right to do, (in the same manner as one who grants double rights does, yet the disponee last in date, if first infeft, will be secure,) and must therefore be liable in reparation to the extent of the price obtained for the lands sold; and that the security for this price must be taken to the heirs of entail in succession, in terms of the entail of Ascog.

Lords President, Hermand, Craigie, and Balgray, concurred in the above opinion.

Lord Cringletie delivered this opinion:—By the entail of Ascog and others, executed by John Stewart of Ascog, afterwards John Murray of Blackbarony, dated 28th May 1763, he conveyed to his heirs the lands of Longcoat, Borland, Milkingston, Windylaws and others, in the shire of Peebles; and, with regard to selling, the deed contains this clause:—'Nor shall they have any power or liberty 'to sell, annailzie, or wadset the lands and others foresaid, or any 'part thereof, except allenarly such a part and portion of the same 'as shall be found necessary for relieving, paying, and satisfying 'the debts and obligements contracted and granted by me,' &c. This declaration of want of power to sell (for it is not a prohibition in direct words) is not protected by any sanction of an irritant and resolutive clause applicable to it, so that the faculty of selling or not rests solely on this clause, that the heirs shall not have power to do so; whereas the other conditions and provisions of the entail are enforced by irritant and resolutive clauses, annulling the deeds done in contravention, and forfeiting the right of the heir. Mr. Murray, moreover, conveyed to his heirs of entail 'all and sundry lands, 'heritages, annual rents, tenements, or houses within burgh, tacks, 'steadings, rooms, possessions, and all other heritable subjects what-'somever, belonging to me in any manner of way at my death, and 'all other heritable and moveable means and effects whatsoever, per-'taining and belonging to me undisposed on at the time foresaid of 'my decease, and all bonds, bills,' &c. This conveyance of the whole estate, other than the entailed lands, was under this condition, that the disponees 'are and shall be holden and obliged in the strictest

'manner, by their acceptance hereof, to convert the said heritable 'and moveable subjects, generally above disponed, into money, and 'to uplift the debts and sums of money above assigned; and after 'payment of my proper debts and the legacies, if any be, to ware, 'employ, and bestow the free residue or remainder, &c. on pur-'chasing of land in Scotland, and to take the rights and securities 'of the lands so to be purchased in the form of a strict entail, to the 'same series of heirs, and with and under the same conditions, pro-'visions, burdens, reservations, restrictions, limitations, clauses irri-'tant, and faculties, as are above set down with respect to my tail-'zied lands herein mentioned,' &c. Accordingly, the lands of Drum-fen and others were purchased and settled on the same series of heirs, under the same system of tailzie as those originally entailed by Mr. Murray himself, so that the obligation imposed on the heirs has been fulfilled. But the lands being entailed, in terms similar to those applicable to Ascog, they are equally liable to be sold.

The present heir, Mr. Campbell Stewart, has sold the lands in Peebles-shire; and the question now at issue is, whether he is bound or not to re-employ the price of them in the purchase of other lands, to be entailed in the same terms as those contained in the original tailzie? The subsequent heirs plead that he is bound, while Mr. Stewart says that he is entitled to dispose of the money as he thinks proper.

The ground on which the heirs proceed is, that the declaration of the want of power to sell, which I shall call a prohibition, constitutes a claim of damages or reparation against the heir who acts in contravention of the terms under which he holds the estate; and these damages are the value obtained for it, which becomes a surrogatum to be re-employed in the acquisition of other lands. This appears to me to be a total mistake, arising from converting the simple prohibition, or want of power to sell, into a declaration, that in case any of the heirs should sell, he should be obliged to lay out the price in purchasing other lands, which, in my apprehension, is contrary to all the rules which have hitherto been applied to the construction of tailzies, one of which, and the great and leading one, is, that no obligation is to be imposed on the right of property by implication. In a question at present before the Court between the Duke of Gordon and John Innes, Esq. the opinions of the Judges of the Second Division on a different point are printed; and there it was distinctly laid down, 'That all presumptions, drawn from implied intention, 'are to be rejected; 2dly, That fetters are not to be raised on infer-'ences, nor extended by analogy, from cases expressed to cases not 'expressed, however similar; and, lastly, That no effect is to be 'given to intention, unless expressed in clear terms.' The prohibition is therefore effectual to prevent a sale, or it can have no force at all. If one obligation can be inferred from a breach of it, why may not another? Why shall the construction not be that the heir

has forfeited altogether? that seeming to be the intention of the entailer, in so far as relates to the contravention of the other conditions of his tailzie. It is admitted on all hands, that a simple prohibition to sell or annalzie does not form any obstacle to a sale to an onerous purchaser; but an idea has found its way into the minds of lawyers, that there is a distinction between the public and the heirs of entail; so that although the public may buy without committing a wrong, an heir is guilty of it by making the sale. With the greatest deference this appears to me to be a radical mistake, proved to be so by the statute 1685, c. 23, itself. Such are considered to be the powers of a proprietor by the law of Scotland over his property, that his deeds must remain effectual against it as long as he continues to be the proprietor; and therefore before any of his deeds regarding it can be set aside, there must both be a clause irritating or voiding the deed, and a resolutive clause, whereby his own right must also be forfeited by having done that deed. Nor is there the smallest shade of difference between these deeds with respect to heirs and the public. It is indeed laid down by our authors, that a gratuitous alienation in contravention of a prohibition may be set aside on the act 1621. I will not controvert this, although I think that it has arisen from old ideas of law entertained before the date of 1685, c. 23, continued down, without attending to the alteration introduced by that statute; and, 2dly, That in the cases to which the statute has been found to apply, the prohibition to sell was constituted in the form of an obligation on the heir of the estate not to do it, whereby the succeeding heirs were considered to be creditors of him in possession. But surely if this be true, or indeed whether or not, it is admitted on all hands that this statute 1621 applies entirely to the protection of onerous creditors, for setting aside gratuitous alienations to their prejudice, and consequently does not apply to an alienation for onerous causes; and it leads to this great conclusion in this question, that there was no ground on common law for setting aside even a gratuitous alienation to the prejudice of creditors, when it required the intervention of the act 1621 to operate that effect. Accordingly, it is not so much as insinuated by Mr. Erskine, that there is any ground at common law for setting aside a gratuitous alienation, and far less for reducing a sale. On the contrary, he says that the heirs may burden the lands, or alienate them for onerous causes. He then alludes to the opinion of older authors that inhibition might be used on entails, which he controverts, and adds—'For restraints are not to be multiplied by implication, and 'inhibition is ineffectual where the person inhibited is not laid under 'some prior obligation, which may be the foundation of the dili-'gence.' Here then is a passage certainly implying that a prohibition to alienate contains no restraint on the heir to sell, and constitutes no obligation of any sort against him. How then can there be any difference between heirs and the public? I cannot discover any,

except in the case of a gratuitous alienation, which, it is said, may be set aside on the act 1621. By common law the consent of the superior was necessary to make an entail; and it is expressly laid down by Lord Stair, that by the consent of the superior and vassal, an entail could be evacuated at pleasure. It is therefore no way probable that in passing the act 1621, c. 18, the Legislature had the matter of tailzies in any way in their contemplation; and, in my humble opinion, any one who reads that statute must be satisfied that it had no such thing in view. I admit, however, that it has been applied to the reduction of gratuitous alienations in contravention of a prohibition to alienate, constituted in the form of an obligation not to do so; and allowing this to be sound law, which, with great deference, I doubt, there is no reason for extending to an onerous sale dubious principles applying only to a gratuitous alienation. The predicament in which the estate is placed by the latter is toto cœlo different from the former. The estate itself is rescued from the gratuitous disponee, and the intention of the entailer is continued in execution. But by the sale his estate is carried off for ever to strangers, and all his views are defeated.

But I have shown that, by our old common law, there is no difference with respect to the right of the public and that of the heirs of entail; and that to set aside a gratuitous alienation, in contravention of a prohibition to sell, required the force of the statute 1621. But whatever were the old ideas of the power of entailers and the force of their tailzies, I imagine that it must be conceded by all, that these are and have been all regulated by the statute 1685, c. 22. That act appears to me to proceed on this great principle, that it was possible to affect the public through the medium only of the heirs of tailzie; and consequently it was thought necessary to place both on the same footing, except in one single insulated case. It declares that it shall be lawful to his Majesty's subjects to tailzie their land and estates, and to substitute heirs in their tailzies, with such provisions and conditions as they shall think fit, and to affect the said tailzies with irritant and resolutive clauses, whereby it shall not be lawful to the heirs of tailzie to sell, annalzie, or dispone the said lands or any part thereof, &c.; declaring all such deeds to be in themselves null and void, and that the next heir of tailzie may, immediately upon contravention, pursue declarators, and serve himself heir, &c.

Now, it will be observed, that in this clause there is not the least notice of or reference to the public. It is directed exclusively to the heirs of entail, and the mode is specifically prescribed how they are to be restrained. The entailer may impose what conditions he pleases on them, but he must add irritant and resolutive clauses, whereby it shall not be lawful to the heirs to sell, &c.; and if he do not add these irritant and resolutive clauses, surely the conclusion is, that it shall be lawful to sell, &c.

But the statute proceeds to declare, that such tailzies (viz. such as restrain the heir, for hitherto heirs only are mentioned) 'shall be 'allowed, in which the foresaid irritant and resolutive clauses are in-'sert in the procuratories of resignation, charters, precepts, and in-'struments of sasine, and the original tailzie once produced before 'the Lords of Session judicially, who are hereby ordained to inter-'pone their authority thereto, and that a record be made in a parti-'cular register-book, &c.; and which provisions and irritant clauses 'shall be repeated in all the subsequent conveyances of the said tail-'zied estate to any of the heirs of tailzie.' Observe what follows,— 'And being so insert, his Majesty, with advice and consent foresaid, 'declares the same to be real and effectual, not only against the 'contravenors and their heirs, but also against their creditors, com-'prisers, adjudgers, and other singular successors whatsoever.'.

Here then it is expressly declared, 1st, That there must be irritant and resolutive clauses to affect the heirs; 2d, That these must be insert in all the conveyances and transmissions of the estate; and, 3d, That the tailzie must be recorded in the register of tailzies, all which is necessary to make it effectual against the heirs and the public. There is no distinction between the two, as is proved beyond dispute by the immediately following clause of the statute relative to heirs alone: 'It is always hereby declared, that if the said provisions and irri-'tant clauses shall not be repeated in the rights and conveyances, 'whereby any of the heirs of tailzie shall brook or enjoy the tailzied 'estate, such omission shall import a contravention of the irritant 'and resolutive clauses against the person and his heirs who shall 'omit to insert the same, whereby the said estate shall ipso facto 'fall, accresce, and be devolved to the next heir of tailzie, but shall 'not militate against creditors and other singular successors who 'shall happen to have contracted bonâ fide with the person who 'stood infeft in the said estate, without the said irritant and resolu-'tive clauses in the body of his right.' Here there is a distinction laid down between the heirs and the public in one single case, which in my opinion proves incontrovertibly, that in other particulars the statute applied to both indiscriminately; and the consequence of this is plain, that if an entailer do not choose to observe the mode pointed out to him by the statute, he has not taken the proper method to restrain the right of property in his heirs, who are therefore as free as is the public. To say that he has a right to prohibit his heirs to sell, and that if they do contravene that prohibition, they are liable for damages, which are, to lay out the price on another estate, is just to repeal the statute, and to make an entail effectual against an heir, although there be no irritant and resolutive clauses applicable to a sale,—to make it not lawful for the heir to sell, by the mere force of a prohibitory clause, when the statute enacts, that to make it not lawful, the prohibition must be affected by irritant and resolutive clauses. It is to enable the entailer to entail money, viz. the

price, when he has not entailed the land. It appears to me that the only possible ground on which a prohibition to sell can be converted into an obligation to re-employ the price obtained by a sale, is, that equity demands that the person who takes an estate under a prohibition to sell, ought not to be allowed to violate it with impunity. But I entirely concur with what was observed by the Lord Chancellor on the case of Westshield, that there is no equity in restraints on the use of property; and I consider this observation to be proved by the statute 1685, which renders certain forms necessary in order to restrain effectually heirs to estates from alienating them. If the Legislature had thought that there was any equity in enforcing restraints, they would have either not passed that act, or declared that a prohibition to sell, or contract debt, or alienate, should be effectual both against the heirs and the public. But, as is already said, such an enactment was neither consonant to principles of law or the ideas of the Legislature. A case was put, at the pleading of this case, by the pursuer. It was supposed that an entail contained a prohibition to the heirs to sell or alienate the whole or any part, and also contained a resolutive clause applicable to this prohibition, but no irritant clause. The heir was supposed to make a partial sale, which could not be set aside on account of there being no irritant clause; but, in consequence of the partial sale, the heir's right to the remaining part unsold was forfeited; and it was contended that he could not be called on to refund or re-employ the price of the part sold. This concession by the pursuer (viz. that the heir could be forfeited for contravention, in virtue of the resolutive clause, when there was no irritant one) was laid hold of by the defender, who replied, that if the contravener could be forfeited for having made a partial sale, the same consequence would follow if he had sold the whole; but, as the subject could not be recalled from an onerous purchaser, the consequence must be, that the heir must be found liable for the whole price, because otherwise this result would ensue, that the heir would be punished for a partial contravention, by forfeiting his right to the remaining part of the estate, whereas, if he sold the whole, he could not be liable in any way to the succeeding heirs. To solve this difficulty, I am of opinion that the concession was a mistake in law, viz. that the heir could be forfeited for the partial sale, while at same time it remained effectual.

The act 1685 makes it necessary to have both an irritant and resolutive clause, in order to affect the heir, and make it not lawful for him to sell; and accordingly it has been decided in this Court, and in the House of Lords, that an irritant clause without a resolutive, and, per contra, a resolutive clause without an irritant, are each ineffectual to restrain an heir of tailzie from selling. This was argued by the Court in the case Gardner v. Heirs of Entail of Dunipace, reported by Lord Kilkerran, p. 540, No. 4. And I the more particularly refer to this case, because although, for want of an irri-

tant clause, the debts were found to affect the estate, no use was made of the resolutive clause to forfeit the heir; nor does there appear on record a single instance, so far as I know, in which an heir has been forfeited in virtue of a resolutive clause, when the tailzie was defective in one irritating his deeds. In the case of Dunipace, Lord Kilkerran details the doubts and subtleties that had existed among lawyers relative to irritant and resolutive clauses. He says that no man ever doubted the necessity of a resolutive clause, 'while 'our lawyers were not agreed that an irritancy of the debt was ne-'cessary where the contravener's right was irritated.' Thus it was not agreed among lawyers whether an irritant and resolutive clause were both necessary; and Lord Kilkerran continues,—'And though 'the statute has no retrospect, it has always been considered as set-'tling the several subtleties about which lawyers had been so much 'divided, and particularly the import and effect of irritant and reso-'lutive clauses,' &c. The statute then settled these subtleties, and it declares that it shall be lawful to tailzie, with such conditions and provisions as the entailer shall think fit, 'and to affect the said tail-'zies with irritant and resolutive clauses, whereby it shall not be 'lawful to the heirs of tailzie to sell, annailzie, &c.; declaring all 'such deeds to be in themselves null and void, and that the next heir 'of tailzie may, immediately upon contravention, pursue declarators, 'and serve himself heir.' Both clauses are therefore necessary,—the one to set aside the deed of contravention, and the other the right of the contravener; for if the deed be not voided, the succeeding heir cannot pursue declarators, and serve himself heir. I therefore conclude, that if a tailzie do not contain an irritant clause, the resolutive will be inoperative, as much as an irritant clause is without the resolutive; and consequently no argument can bear on this cause which proceeds on a contrary supposition. In my humble opinion, an entailer who prohibits his heirs from selling, and who does not make that effectual by irritant and resolutive clauses, must be understood to say, I prohibit you from selling, which is declaring my wish that you shall retain my estate; but if it so happen that you do not find it convenient to comply with my desire, I cannot help it; I do not choose to restrain you.

It is pleaded by the defenders, that the prohibition is only personal against the heir; but I apprehend this to be a mistake. The prohibition is entered in the infeftment, and thereby must be a real burden on the heir, if it be validly constituted. But my opinion is, that it is neither real nor personal against the heir more than against the public, because it is not validly constituted by law. There are, therefore, two mistakes;—one in assuming that the prohibition is effectual against the heir, though not against the public; and, 2dly, assuming that the contravention forms an obligation on the heir to make reparation. Nothing can more distinctly prove that a prohibition forms no personal obligation upon an heir than the fact now

universally admitted, that an inhibition used against him has no effect whatever, although the contrary seems to have been understood in the days of Lord Stair, and even Lord Elchies. A very ingenious attempt was made by the counsel for Mr. Fullerton to show that the reason why an inhibition is not competent on an entail is, that inhibition is only effectual to enforce or secure implement of an obligation to do or pay something, whereas here there is only a prohibition to do. But this appears to me just to prove, that even in a question inter hæredes there is no obligation constituted by the prohibition. There is only one way appointed by the statute whereby it shall not be lawful to the heirs of tailzie to sell, and if that way be not adopted, the conclusion surely follows that it remains lawful to them to sell; and if it be lawful, I cannot, by any process of reasoning of which I am capable, arrive at the conclusion that they are under an obligation not to sell, and are liable for damages for doing what is lawful to be done; whereas if there were an obligation, it would secure the performance of it, and prevent the public from aiding to commit the breach. The mistake under which these old lawyers lay with regard to the effects of an inhibition accounts for their opinions on tailzies containing a prohibition to sell or alter, &c. They held the prohibition to be coverable by an inhibition; but that being a mistake, it follows that the prohibition constitutes no obligation. It is just a prohibition, and nothing more; and if not made effectual by irritant and resolutive clauses, it has no effect whatever on heirs more than singular successors. It was said by the defenders' counsel, that an inhibition is not effectual in the case of an entail, because the estate is protected by a statutory immunity, arising out of the act 1685. But this is giving in other words the reason which I have already offered. For what is the immunity? Nothing else than this, that if an estate be not entailed in terms of the statute 1685, the entail cannot be propped by an inhibition. It is saying that a prohibition to sell forms no obligation upon the heirs; because, if it constituted an obligation, the inhibition would be as effectual to prevent a sale to the injury of the succeeding heirs, as an inhibition is against the proprietor of an unentailed estate selling it to the defeazance of the right of a creditor by bond or minute of sale. The principle therefore is, that a prohibition is a mere restraint, and does not constitute any obligation whatever, either in law or equity.

Another strong proof to me that the public and an heir are in the same situation, and that the former can be affected only through the latter, is, that the public and the possessor of an unentailed estate are placed in the self-same situation by law. If an inhibition be not duly executed against both, it can have no effect. Its object is to secure the landed property of a debtor to his creditor. If the inhibition be not duly executed, the debtor may sell his estate, and the creditor can have no redress. An arrestment may be used to secure the price; but the inhibition alone will have no effect. The same hap-

pene if the inhibition, though duly executed, be not recorded within forty days after its execution. The statute 1581, c. 119, declares 'that na interdiction or inhibition to be raised and executed here-'after be of force, strength, or effect, to onie intention; bot the 'samen to be null and of nane avail, except the samen be duly re-'gistrat, as said is.' In the same spirit the act 1685 gave power to the lieges to tailzie their lands and heritages, and to affect the same with clauses irritant and resolutive, whereby it shall not be lawful to the heirs of tailzie to sell, alienate, &c. If the lieges do not choose to affect their tailzies with irritant and resolutive clauses, no other conclusion can follow, than that it remains lawful to the heirs to sell, &c.

It has been endeavoured to assimilate a prohibition to sell, to the obligation constituted by a man providing his estate to his children by an antenuptial contract of marriage, to make that estate or its value forthcoming to them. But to me there does not appear to be the least analogy between the two. The intention is to provide the children, not with this or that estate, but to make a provision for them to the extent of the estate alluded to in the contract. The father is left in the fullest power of administration, in the exercise of which he is understood to act tanquam bonus vir, having always in view the intended object of providing for his children, and may therefore sell the estate, or keep it, as he thinks most conducive to the proposed end; and it even admits a greater license, for he may provide for a second wife and family. It is a contract uberrimæ fidei, a favourite of the law. It contains no prohibition upon the husband to manage as he thinks proper; but it contains an obligation upon him to provide for his family, receiving the most liberal interpretation, and the utmost support; whereas an entail is strictissimi juris, tolerated by the law under certain conditions. It is a deed wherein the granter has respect to one estate, and that alone. All his cares and anxieties bear reference to it. His heirs are to be of that estate, to bear the name and arms of him and that estate, which is to be transmitted to his heirs in tempore futuro. If, therefore, the estate be disposed of, his object is frustrated; and he can never be presumed to intend that his heirs shall sell and acquire other estates, repeating such procedure two or three times in a year. The principle is absurd, and the consequences of it expose it to be so. For, only to mention one of them,—I would wish to know who is to determine what lands are to be bought, or how the money is to be laid out in the mean time, or whether lands are to be bought in Scotland or England, or in any other part of his Majesty's dominions? In further illustration of the distinction of the principles of law which I have laid down, I refer to the case of an heir of entail not recording the tailzie. All authorities are agreed that if it be not recorded, all his deeds will affect the estate. Thus he and the public, in the first instance, are on the same footing. Both are free to act. But the heir who left

the tailzie unrecorded, and contravened its prohibitions, would be liable for damages, if there were in it, as there commonly is, an obligation to record the tailzie, because there would be a direct breach of an explicit obligation, which he could be compelled by an action of law to implement; whereas, it is decided, that by any action he cannot be prevented or interdicted from contravening a prohibition, if not fenced by an irritant and resolutive clause. If in the tailzie there was no obligation laid on him to record the tailzie, he might leave it unrecorded, and be liable to no damages for doing so.

One other consideration strikes me as highly illustrative of my opinion, and proves that in law no claim for damages arises out of the contravention of a prohibition. In the Queensberry entail, there was a prohibition to alienate under an irritant and resolutive clause, &c.; and the late Duke of Queensberry let leases, for which he took large grassums. It is well known that these leases were considered to be alienations struck at by the tailzie, and were set aside, in consequence of which the Duke of Buccleuch raised actions, in which he claimed from the executors of the Duke of Queensberry violent profits or damages from the date of the death of the latter; and this he grounded on the principle that his Grace, by granting such leases, had contravened the prohibition in the tailzie, and thereby deprived the Duke of Buccleuch from drawing the true rents of the farms, which otherwise he would have done. But this Court and the House of Lords both declared that no such claim arose out of the violation of the tailzie.

The leases were set aside, and that was all the redress that could be obtained. It has been said that there was an irritant and resolutive clause applicable to the tacks, and by these the Duke of Buccleuch might have had his redress, and therefore was not entitled to any other. But this is just saying that the prohibition to alienate, which was judged to apply to these leases, was protected by a sanction; and from that it surely follows, that if there be no sanction imposed by the entailer, when he had it in his power to add one, the Court is not entitled to add one for him. Would it not be an astonishing proposition, that the Duke of Buccleuch would have been better off if there had been no irritant and resolutive clauses, than he was with them? If there had been none, the leases would have subsisted, and his Grace would have obtained damages, if the argument of the defenders be solid; but, by having it in his power to set aside the leases, he got none. By the entail being effectual, he was in a worse condition than if it had been defective. But can any man possibly say, that although there were irritant and resolutive clauses, there was not also a prohibition, which was violated? And as it is from that violation that the claim for damages arises, it appears illogical to maintain, that, because an additional sanction is introduced, that the other, said to be founded in common law, is lost. I am therefore humbly of opinion, that the case of the Duke of

Buccleuch against the Executors of the Duke of Queensberry is a case directly in point, and settles that the contravention of a prohibitory clause in an entail does not constitute any claim of damages against the contravener.

But it was also argued, that the doctrine of surrogatum applied to this case; because, since the heirs, after the pursuers, would have had right to the estate if he had not sold it, they are entitled to the price as coming in place thereof. To me this doctrine does not seem to apply.—Surrogatum takes place only where the absolute property is vested in the person who claims the subject that comes in its place. For instance, when an heiress of a landed estate marries, without conveying her estate to her husband, the right to the rents only belongs to him, while the property of the subject itself remains with her. If they find it convenient to sell the estate, she must concur in the conveyance; and of course the price coming in place of the subject itself belongs to the wife, as a surrogatum for the land which was hers. The same principle applies to all the other cases collected under the word Surrogatum—the actual right of property must have been in the person, or his heirs, who claim the surrogatum. But here the heirs of Blackbarony had no right of property in it. They had nothing more than a spes successionis, defeasible at the will of the pursuer; so that, with much deference, I am clearly of opinion that the doctrine of surrogatum does not apply to this case. It must be solely on converting the prohibition to sell into an obligation to re-employ the price, that the defender can have a chance of success; and I consider that I have distinctly proved that no such obligation can be inferred, either in law or equity.

Various authorities were referred to by the counsel for Mr. Fullerton, which I do not mean to investigate: 1st, Because I know that some of my brethren, who concur with me in opinion, will do so; and, 2dly, Because I know that in the case of Westshiells, part of which estate was sold in contravention of a prohibition, the Second Division found Sir James Stewart liable to re-employ the price. On an appeal, the Lord Chancellor was of opinion that there was no precedent applicable to the case, and remitted to the Second Division to reconsider it; which their Lordships will probably never be required to do, as it has been at rest for more than ten years. I will only remark, that the case principally relied on by the defender is that of Cuming of Pitlurg *v.* Gordon, 29th July 1761, in which the Court indirectly found that the heir of entail was not entitled to sell the estate, and gave as a reason for doing so, that if he did, he would be liable to re-employ the price. The Court so far altered this judgment in the case of Westshiells, wherein it was found that Sir James Stewart was entitled to sell the estate, although they also found him liable to re-employ the price; and as for the reason assigned by the Court in the case of Pitlurg, the question was not before it, either in the summons or the argument, so that it must properly be con-

sidered as obiter dictum; and, on these grounds, I consider it to be no way wonderful that the Lord Chancellor held it to be no precedent.

I would add, that the clause conveying the heritable and personal estate belonging to John Murray to his heirs, and taking them bound to convert it into money to be laid out in purchasing land, shows the difference between an obligation and a prohibition; and it would be strange to construe in the same way clauses totally different in their object and expression.

Perhaps it may be true that John Murray intended to direct his irritant and resolutive clauses against a sale; but there is no certainty whether he did or not. In law, his meaning must be collected from his words. He only prohibited his heirs from selling more land than was necessary to pay his debts. They were therefore at liberty to sell if it was necessary, and he must have seen that they might sell more than was requisite; yet he did not, even in that case, impose any obligation on them to lay out the surplus on land to be entailed. And I am of opinion, that as he did not constitute his prohibition in the form required by the statute to bind his heirs, it was lawful for them to use their right of property; and as he imposed no obligation on them in case of sale to re-employ the money for behoof of his heirs of tailzie, the defender, Mr. Stewart, cannot be liable for damages or reparation for exercising what was lawful for him to do; for I consider it to be a solecism in law or in reason, that any man shall be liable in damages for doing that from which the law cannot restrain him.

LORDS ALLOWAY and ELDIN delivered this opinion:— This entail being defective in the irritant and resolutive clauses, is not sufficient to prevent the proprietor from selling the entailed estate. Accordingly, he has sold a part of it, and the purchaser having suspended payment of the price, the case has been brought before the First Division of the Court by suspension at the purchaser's instance, and declarator at the proprietor's instance, against the heirs of entail, concluding that he had right to sell, and the lands being sold, that he has right to the price as his own money. Under these circumstances, the question is, Whether the proprietor's claim to the price is well or ill founded?

We are of opinion that the pursuer had power by the entail to sell the lands in question, and the lands being sold, that he has right to the price as his own money, without being liable to any claim whatever on account of the sale.

It is well known, that before the use of entails in Scotland, with irritant and resolutive clauses, all proprietors of land had power, with consent of the superior, to alienate their estates; and, when the destination in the charter was so expressed as to transmit the lands, upon the death of the proprietor, to an heir, or a series of heirs, the heir who succeeded had power, with consent of the superior, to make a different destination, and, even without the superior's consent, to

alter the investiture of the lands by means of adjudication, a process which the superior could not oppose.

But not long after the beginning of the 17th century, various devices were contrived by lawyers, intended for the purpose of imposing such fetters upon the landed proprietors as to prevent them from alienating or burdening their estates. We are of opinion that such contrivances were altogether nugatory, till the act 1685 was passed, of which afterwards. It cannot be questioned that the act is compulsory, but at common law there is no valid entail, and no such entail can be contrived.

Prohibitory clauses were the first restrictions attempted against the heirs of investitures; but they were not sufficient to prevent the proprietor from altering the entail. For he never was without power, in virtue of the right of property, to alienate the lands, or contract debt; and in either case the prohibitions were ineffectual, because no prohibition could prevent a creditor or purchaser from carrying off the lands by his diligence. Nor was the proprietor bound by the prohibitions. A prohibition did not bind him to re-employ the price if the lands were sold, nor to redeem if they were apprized or adjudged.

Thus it appears that the prohibitory clauses were altogether nugatory, unless they were enforced by inhibition, a diligence which was in use for a long period. But, for the purpose of securing an entail, it is now exploded, and the prohibitory clauses give no disturbance to the proprietor in his selling or contracting debt, because they cannot be enforced by inhibition. See the cases of Bryson against Chapman and Barry, 22d January 1760—Lord Ankerville against Sanders, &c. 8th August 1787—and Lockhart against Stewart, 11th June 1811, in all which inhibition or interdict was refused.

It does not appear that at any time clauses in an entail, when they were merely of a prohibitory nature, and were not enforced by diligence, operated as an effectual restraint upon the proprietors of estates. But they may have had some effect, though they could be defeated; and very soon after they were introduced, contrivances followed them, apparently of a more powerful nature. The irritant and resolutive clauses were soon afterwards invented and employed. Conditions also were sometimes used by the conveyancer. These did not assume the form of prohibitions, or the threatening aspect of irritant and resolutive clauses, but appeared in the shape of obligations undertaken by the proprietor, and binding on him personally by the terms of the investiture. Some of these were direct obligations, and others of them were in words intended to operate by means of implication. How far such clauses would be useful amidst a crowd of irritancies, it is unnecessary to consider, as there are no such clauses in the investiture of Ascog.

For a direct prohibition to sell is not in the form of an obligation. The proprietor is only prohibited, without being laid under the ne-

cessity of obeying the prohibition. He is no more bound against selling the lands, than he would be bound by a prohibition in the entail against committing any other act that had no reference to the management of the estate. Nor is there even an implication in the prohibition, to the effect that it must be construed as an obligation. An entail admits of no implication. The words must be direct and plain in their meaning; but if implication were admissible, there is no implication in the words of a prohibition.

Supposing then an entail with irritant and resolutive clauses, it is idle in such a case to pretend that prohibitory clauses against selling, &c. can have the smallest effect by implication or otherwise. In such a case, the pretence of an obligation to re-employ the price when the lands are sold is utterly absurd. No such obligation has been expressed in the entail, and no such obligation is implied; for some express obligation is necessary to raise an implication of some other obligation. But it is evident that a prohibition creates no express obligation whatever.

Much less does an obligation to re-employ arise from the contravention of irritant and resolutive clauses, which accompany clauses merely prohibitory, without having an obligatory form. In such a case, the contravention raises no obligation at all.

The true effect and force of the irritant and resolutive clauses have not been well understood by the defenders. These clauses were invented merely for the purpose of assisting the prohibitory clauses, and in the performance of their functions, it must be admitted that they proceed in a manner sufficiently menacing. By these clauses the proprietor is threatened with absolute ruin to himself and his family, if he should happen to waste or destroy the estate, or any part of it, however small. Power is given to all and each of the heirs of entail to bring a comprehensive action for depriving him of the estate altogether, without leaving him the smallest hopes of recovering it, or any part of it. Even his descendants, to the latest generation, are in some cases reduced to beggary without relief, though they are totally innocent of any fault. At the same time, all the deeds of the proprietor which might affect the property of the estate are reduced, and he is not allowed the means of paying his most urgent debts from the rents, however ample they may be. Such is the plan of a strict entail, as is contrived for the purpose of preserving the entailed estate.

Such being the rigorous nature of the irritant and resolutive clauses, they have necessarily introduced a considerable relaxation in the legal construction that has been applied to them. Of this the instances are so numerous, that it is unnecessary to enter into the particulars. It is enough to say, that they are so modified in the practice of the Court, that the clauses which appear prima facie to be so full of rigour, are seldom extended to the forfeitures so much denounced by the terms of the entail.

It was, however, the object of these clauses to secure a full and complete protection of the entailed estate, and it was thought necessary, 1st, That all deeds of the proprietor against the prohibitions, or in contravention of them, should be void and null, and so declared by the express terms of the entail itself. The reason for adopting such a clause was sufficiently obvious. It was held in law that every deed of a proprietor was necessarily effectual against the estate, unless the right was cut off by a quality inherent in it. For it was held that no man could be a proprietor, without having power to bind his estate, unless his power was qualified by the condition, that all his deeds contrary to the prohibitions should be absolutely void and null. This clause is directed, not so much against the proprietor himself, the contravener, as against the creditor or purchaser, who had by debt or purchase obtained a right which would have been effectual if it had not been so annulled.

It could not be said that the creditor or purchaser had in any way consented to such a condition, but the proprietor himself had consented to it, by accepting of the investiture qualified by that condition; and the superior who had granted the right was held to have power in granting it to qualify it with that condition, or any other condition consistent with law. Besides, the party to whom the property had previously belonged, and who conveyed it to the superior under the same conditions, was held to have power to restrict the terms of his gift, so as to annul the deeds which were contrary to the nature of the gift, and, at the same time, contrary to the same conditions which had been assented to by the superior.

Further, in order to secure the object of these clauses by a full and complete protection of the entailed estate, it was thought necessary, 2d, That the person who should contravene the entail, &c. should forfeit his right, which should become void and extinct, and the estate should devolve upon the next heir appointed to succeed, and that this should be declared by the entail itself. For this the reason is sufficiently obvious. It was held in law that no man could possess a right to lands without having power to bind those lands for his debts and deeds. In this view, the irritant clause, though it was necessary, was not sufficient per se for the safety of the estate. For it was not enough to declare the nullity of the deed of contravention, and to declare that the creditor or purchaser should obtain no right by or through the deed in his favour. The irritant clause did not take away the contravener's right to possess the estate itself; and while he continued to possess it, the law gave him full and complete power to dispose of it; and the estate was exposed, while in his possession, to the claims of every creditor and purchaser.

Thus the two clauses were held to be necessary as counterparts of the same plan. The right proceeded from the will of the former proprietor, who had the absolute power of disposal; and the power which belonged to him was held to be carried into effect by the con-

sent of the superior. But still it was held to be necessary that all deeds of contravention should be declared void and null; because, if they were not so declared, they were not held as being null and void, although they were contrary to the prohibitions. And that in every case of contravention, the contravener should forfeit his right, as already mentioned, and that this should be declared by the entail itself; because the nullity of the deeds, though declared by the irritant clause, was not attended with the forfeiture of the contravener, so long as there was nothing in the entail, or nothing declared, to prevent him from retaining his right to the property.

In this manner the prohibitory, irritant, and resolutive clauses reciprocally assist each other, and are absolutely necessary to preserve the titles of the entailed estate against sales or dilapidation.

But these subtleties of the lawyers, contrived in an early period of the seventeenth century, were of a very questionable nature; and though there was a decision in favour of an entail, in the famous case of Stormont, in which the entail was so defective that it even wanted an irritant clause, that decision never had any authority; and the greatest lawyers held the whole of the plan to be extremely doubtful. In effect, it is humbly thought the plan was full of difficulties, and could not have been supported by the common law. It may be noticed, in particular, that the irritant clause did not annul the act of contravention before declarator. In the mean time the contravention was valid. Neither did the resolutive clause take away the right of property before declarator. The heir still remained proprietor, having right to act as such.

In short, the act 1685 was necessary to establish the validity of entails. It is thought that no view of the common law could have supported them without the aid of that statute. This is a point which may now be considered as absolutely indisputable, as it has been established by the highest authority in the law, against which nothing of any weight can be stated. See Stair, b. 2. t. 3. § 43 and 58, Tailzies—Erskine, b. 3. t. 8. § 25—Mackenzie, Vol. II. p. 489—Opinions of President Miller, and Justice-Clerk Braxfield, and of Court—Hamilton, &c. against M'Donald, 3d March 1815; Fac. Coll. p. 326 and 327.

It may now be considered more particularly, whether the pursuer is under any legal obligation to re-employ the price of the lands which have been sold. Upon this important question the following considerations may be offered.

It is quite clear in law, that, before the introduction of strict entails in Scotland, proprietors had power to alter their investiture in virtue of their right in the property, and that without being subject to any claim from other parties; and, of consequence, when they sold the land, they were not bound to re-employ the price of it, but had power to dispose of it as they thought fit.

This is the foundation of the present argument, because it will be

found that proprietors of land at the present day have the same powers, excepting in those cases in which they have been restrained by law from selling, or have incurred an obligation to account for the price of the land when it is sold.

The introduction of strict entails was an innovation which interrupted, in various ways, the commerce of land; and ultimately, by the statute 1685, c. 22, when it is applied, the heir of entail is deprived of the power of selling. But where that statute has not been properly applied, he has not only power to sell, but, as we conceive, he has power to dispose of the price; for entails, before the statute 1685, were not warranted by any law whatever, and the statute being passed, it did not apply to nor warrant every entail that might be contrived. For the statute, so far from being intended for every entail, is intended only for entails of a certain form, and when enforced by irritant and resolutive clauses; and certainly, after the statute 1685 passed, no entail could be effectual but those in which the parties had availed themselves of the enactments of that statute. And all other entails, not being warranted by the statute, were not sufficient to bind either heirs or creditors; and such is the entail of Ascog, now in question, as it not only enables the proprietor to sell, but puts him under no restraint as to the price, by re-employing it for the benefit of the other heirs of entail, either by the purchase of land to be entailed, or in any other way.

For the entail of Ascog is not one of those which contains fetters or obligations binding the pursuer to employ the price. There is no such obligation in the entail. There is indeed a prohibition to sell; but such a prohibition, in an entail that is not fenced by irritant and resolutive clauses, is a prohibition which may be legally discharged, as it contains no obligatory force. The prohibitory clause is not binding even by implication, though implication, if it could be alleged in this case, is not admissible in a question of strict entail. Now, the entail of Ascog is one of the strictest nature, with irritant and resolutive clauses applicable to the prohibitions. This, therefore, is the case of a strict entail, in which no implication whatever can be allowed.

It is alleged that this is a question among heirs, and that although strangers are entitled to purchase parts of the entailed estate, the pursuer, who is an heir of entail, is barred by his quality of heir from taking advantage of that purchase. But the answer to this is obvious. In selling a part of the estate, the pursuer did no wrong, but only used the right that was competent to him. To pretend that the pursuer did wrong in selling, because he is an heir, is an imagination for which there is no ground whatever. The defenders can point out no authority, either in the statute or in any law, by which the pursuer was barred from selling, nor any law declaring that he did the smallest wrong in selling. In effect, the question among heirs is the very same with the question with strangers who

may become purchasers. There is no pretence, therefore, for maintaining that there is any law or impediment whatever against the pursuer in making use of his right.

Some of the other arguments are still more untenable. For example, it has been stated that the price of the estate is a surrogatum for the estate itself, from which it is inferred that the price, like any other surrogatum, must be employed in the purchase of property to be entailed. But this is an absolute begging of the question, if indeed any dispute on the subject can be maintained. Before it can be made out that the price is a surrogatum, the defenders must establish the fact that they have a right to the price; and if they establish such a right, it signifies very little whether they call it a surrogatum or not. But we conceive that this right of surrogatum cannot be maintained, if it appears that the pursuer had power to sell, and was under no restraint or obligation not to sell. Indeed, if he had power to sell, it seems to follow as a necessary consequence, that he has right to the price, because he sold on his own account, and not on account of the defenders.

The defenders have also founded on the principle upon which contracts of marriage are regulated. But we could not have anticipated an argument of that nature; because the obligations contained in these deeds have no resemblance whatever to the obligations in tailzies. A contract of marriage is in every case full of implication, and depends almost entirely upon the good faith of the contractors; whereas there is not the least room in a strict entail for implication of any kind.

And, upon the whole of this matter, it may be stated with confidence, that the obligations, if such they can be called, in favour of the heirs of entail, cannot be binding in a case in which nothing can be sustained without applying to it the most rigorous construction, which is of necessity given to entails. What words are there in this entail that can, without implication, be interpreted as a binding obligation to re-employ the price of the lands which have been sold? Excepting the destination itself, in which the heirs of entail are enumerated, there is not a single phrase in the deed that must not be construed according to the most lax interpretation, before any claim of this nature can be raised upon it. The question then comes to be, whether the rules of interpretation so completely established are to be wholly abandoned, for the benefit of these heirs of entail? So far is this from being tenable, that the defenders would certainly have failed in their case, although the irritant and resolutive clauses, which destroy every kind of implication, had been cancelled.

Prior to the statute 1685, the effect of entails depended very much upon imposing the different clauses or conditions in an obligatory form, so as to be expressly binding upon the granter and his heirs, as well as the heirs of entail. This form gave the substitute heirs some protection under the act 1621, c. 18. But we conceive,

that, although this statute might have protected gratuitous alienations, as being contrary to any direct obligations entered into, it never could have applied to the present case. This is not a gratuitous sale, but one entered into for a fair and onerous price; nor is it granted to a conjunct and confident person;—two of the essential requisites of the act 1621, without which it cannot apply.

And even in the case of a deed expressed in an obligatory form, the act 1621 had no effect against an entail, in terms of the statute 1685; because that statute had the effect to exclude the other as to the penalties, according to the words of Erskine, 1. 7. 22, that, 'where statute hath inflicted special penalties upon any offence, all 'others are understood to be excluded.' Therefore, since the act 1685, any feeble aid that entails could previously have derived from the statute 1621 was at an end; and, since the passing of the act 1685, every entail must stand or fall by that act alone.

Accordingly, it will be found, from a due attention to the different cases which have been stated and commented on at great length by the defenders, that there is not the least ground for the conclusion drawn from them.

Before considering those decisions which were so much founded on as establishing the right of the heirs of entail to insist upon the heir selling to reinvest the money, it is important to observe, that notwithstanding the vast number of entail cases that have occurred in this country, and in which entails have been set aside in questions with the heirs, we do not know of a single case in which the heir has ever been compelled to re-employ the money, or the price of the estate sold, in acquiring lands to be entailed in the form of the first entail; nor, with all the industry and ability exerted on the part of the defenders, has a single case of this nature been discovered.

Indeed, as it is admitted that the defect in the entail could not be cured by reinvestment of the price in the same terms, the operation might be entirely nugatory, even if it could be legally enforced, since the very person who reinvested could again sell the subjects whenever he pleased, and must be the sole judge of this matter, and of the nature and situation of the subject to be purchased, which might again be sold as often as the whim, caprice, or interest of the person in possession might dictate, without restraint from any of the heirs.

The only case referred to, in which it is alleged this principle was ever carried into effect, occurred nearly a century ago. But it does not appear to us to have the least weight. This is the case of Lord Strathmore against the Duke of Douglas, 2d February 1728. The principles upon which that case was decided have been long ago exploded. It was there successfully maintained, that a prohibition to alienate and to contract debt implied a prohibition to alter the succession, although the direct contrary has been since repeatedly found, both in this Court and in the House of Lords. Indeed, we doubt, from the terms in which this case is reported, and

from the terms of the judgment, whether it was the case of an entail to which the strict interpretation of an entail applied. For the granter of that deed, the Countess of Sutherland, imposed obligations upon her heirs; and as her son, Lord Forfar, served heir of line to her, he was universally liable to implement all her obligations of every nature and description. This would have applied to him as heir of line, even supposing he had not been heir of entail, and must, in the same way, have affected all persons representing him. It seems impossible to hold that case to be authoritative in law, every point, in so far as it relates to the construction of entails, being admitted to be erroneous. And there are also other grounds pleaded by the parties in that case, sufficient to show that it is totally inapplicable to the present.

The next case is that of Pitlurg, 29th July 1761, to which a great deal of importance has been attached. The question, as stated by Mr. Wight, 'was relative to power of an heir of entail to sell;' and the clause on which that question rested was, that the heirs of entail, in the event of committing treason, should lose their liferent, but that the right, after their decease, should return and remain with their next heir of tailzie, and that the heirs of tailzie 'shall never 'have power by any other deed whatsoever, whether treasonable or 'otherwise, by contracting of debt exceeding the sum of 12,000 'merks for provision of their younger children, or any other manner 'of way whatsoever, to squander or put away the same, or any part 'thereof, vel faciendo vel delinquendo, any ways contrary to this pre-'sent settlement.' The whole argument on both sides is merely directed to the point, whether the above clause included a prohibition against selling? And the Court found that it contained a prohibition against selling or alienating the estate, to the prejudice of the substitute heirs of tailzie; and, therefore, that however safe an onerous purchaser might be, the pursuer, by a voluntary sale of the lands, would contravene the tailzie, and be subjected to an action of reparation and damages at the instance of the substitute heirs. Upon this the following remarks may be offered.

1. This case, in so far as it adopted a different mode of construction of the entail, in a question with heirs and third parties, has been completely overturned by all the cases decided since that time. Perhaps the most nice and difficult cases as to the construction of fetters which have ever been tried were with heirs of entail. Such are the cases of Edmonstone of Tillycoultry, of Lady Dalhousie against Brown, of Henderson, and a great variety of other cases, all of which have been decided in this Court and in the House of Lords, and have completely established the very different doctrine, that there is no distinction in the construction of an entail betwixt heirs and third parties, and that there can be no implication in an entail. This, therefore, is admitted to have been an erroneous judgment.

2. After having erroneously decided that the heir fell under the

prohibition to sell, the Court found in that case,—where there was no room for such a finding, after establishing the prohibition,—that by contravening the entail he might be subject to an action of reparation and damages at the instance of the substitute heirs of entail. But after having erroneously adopted the one implication, the Court, upon the same principle, may have implied other obligations. After deciding the first by such a latitude of construction, the same Judges gave an erroneous opinion on the other, although, from the decision of the first point, it was unnecessary to decide the second. This case, therefore, we cannot consider as entitled to any weight whatever.

3. But it was stated that Mr. Miller, (afterwards Sir Thomas Miller,) who writes the petition for Gordon Cuming, the heir in possession, never so much as argued the present point, but confined his whole argument to there being no prohibition against selling; and that there is no discussion with regard to the question of reparation by either counsel, which could not have been omitted, had it been considered a sound plea.

We think the argument in that case, that there was no prohibition as to selling, was absolutely conclusive, and should have succeeded, as it always did afterwards. But we know that some of the most able counsel, whose attention and arguments have been applied to one view of a tailzie, which they conceived quite decisive, have allowed other fatal objections to escape them. Without noticing some most extraordinary instances of this, much later than the case of Pitlurg, the recent case of Blairhall may be mentioned. The question was first tried in this Court. Solicitor-General Blair, Mr. Charles Hay, Mr. Mathew Ross, and another counsel, were engaged upon the same side in that case. Their object was to obtain a judgment that the entail was defective, and that the estate might be sold. It was decided by this Court, and afterwards in the House of Lords, that the entail had not the defect which was alleged. But some time afterwards, the case having come back from the House of Lords, it was discovered that the entail contained no prohibition against alteration of the succession. This had escaped the Court as well as the counsel. But no sooner had the discovery been made, than a new title was made up, by resignation of the lands for a new infeftment in fee-simple, and the question was then tried and decided without the smallest difficulty; and the estate was afterwards sold.

4. But to return to the case of Pitlurg. There might have been strong reasons for not urging the plea that the heir was not bound to reinvest; for the argument in that case, as to the inadmissibility of implication or construction, could not be stronger than it was upon the point of there being no prohibitory clause against selling. Further, at that time it was not distinctly understood whether substitute heirs of entail might not, in certain circumstances, apply for inhibi-

tion against the heir in possession doing any thing to defeat their right. The case of Bryson was decided only the year before. It was not printed in the Reports until 1772, eleven years after the case of Pitlurg. Neither Mr. Miller nor Mr. Garden, the two counsel in the case of Pitlurg, were counsel in the case of Bryson, as appears by the report; and the case of Bryson could not be held as quite decisive until it had been followed by the case of Lord Ankerville, and the case of Westalhalls, &c. &c.

Now, so long as it was understood that substitute heirs of entail could raise inhibitions according to the old system, before the statute 1685 was introduced, there could be no doubt of an existing obligation. But as this doctrine is totally abandoned, the question must now be considered in a different view. In many cases where an express obligation was constituted in favour of substitute heirs, an inhibition was competent; and this may have led to the opinions of Hope, Mackenzie, and Elchies. It will not be disputed, however, that since the time of Erskine, who expresses great doubt with regard to the former decisions, and since the decisions above referred to, inhibitions upon the prohibitory clauses of an entail are totally incompetent. The nature of entails, and the effect of the statute 1685, from the many discussions which have taken place with regard to that statute, are now much better understood than formerly. All those authorities, therefore, evanish which depend on the competency of inhibition.

Indeed, Lord Elchies's opinion, (p. 110,) and the whole authorities to which he refers, just come to this—That if there be a valid obligation not to alter the destination, or to contract debts, there is no reason why a person should not be bound by such an obligation. And if there be a valid obligation against the maker and his heirs, there is no reason why inhibition should not follow on it; and he founds on the case of Binny against Binny, 28th January 1668, as the authority for his doctrine.

Now, let this case be brought to that criterion. Can inhibition, arrestments, or adjudication, be founded on this entail? It is admitted they cannot. But if there had been an obligation, most certainly one and all of these diligences might have followed, provided the deed had contained no irritant or resolutive clauses. But when there are irritant and resolutive clauses in the deed, any other clauses imposing restraints are superseded, upon the principle already referred to, and to be further noticed in the sequel.

In the case of Binny, to which Elchies refers, Margaret Binny had granted a bond, obliging herself to enter heir of line to her father, and to resign the lands in favour of herself, and the heirs of her body, whom failing, to the heirs of Alexander Binny, her father, and obliging herself to do nothing contrary to that succession. She having married, conveys the lands to her husband by the contract. But inhibition had been used on the bond before the contract. Now,

the Court in that case found that the wife was bound to resign, 'seeing there was inhibition used before the contract; but they did 'not decide whether this clause would have excluded the debts to 'be contracted by the said Margaret or her heirs upon a just ground, 'without collusion; but found that she could not make a voluntary 'disposition to exclude that succession, in respect of the obligement 'to do nothing in the contrair.'

If, therefore, any weight could be placed upon the opinion of Lord Elchies, and the authorities to which he refers, it would just come to this, that if there was an obligation either upon the maker or the heir of tailzie, inhibition might be used; but as no inhibition could be used in this case, there is no obligation. And, indeed, in the case of Binny, founded on by Elchies, there was a positive obligation by bond upon Margaret Binny and her heirs, and which, quoad the obligee, who was the person with whom the question was tried, was perhaps an effectual obligation, as the question occurred before the statute 1685.

The only other case founded on as supporting this doctrine is the case of Sutherland, 26th February 1801. But in that case we do not see that there was even any argument upon the subject; and it seems to relate to another point altogether. In that case there was a question, whether the destination in the entail was to be regulated by the dispositive clause, or by the procuratory of resignation? The claimant's predecessor had been nominatim called in the dispositive clause, but his heirs had not been called. The question then was, whether it was to be regulated by the dispositive clause, or by the procuratory of resignation, in which the heirs are called? The Court found that it must be regulated by the procuratory of resignation. The entail contained no prohibition against altering the order of succession. The heir in possession had executed a trust-deed, making his trustees accountable, after payment of his debts, to his heirs and assignees. The entailed estate was sold; and the question seems to have been, Who was entitled to the reversion of the price, after deduction of the entailer's debts,—whether the heirs of entail, or the heirs of the last heir?

As in this case, there was no prohibition against altering the order of succession, the general disposition by the heir of entail in possession, in which he makes his trustees accountable to his heirs and assignees, might have been held as an alteration of that succession. If it had, it would have put an end to the claim of the heirs of entail; and if it had not, the heir of entail was entitled to make good his right to the reversion of the price of the lands, according to the entail, the succession to which had not been altered.

We think it unnecessary to take notice of the cases of Westshiells and of Mountie, the first of which was remitted by the House of Lords upon a very full hearing; and the second, we understand, was settled in consequence of the deep impression made by the remit in

the case of Westshiells, and of the Lord Chancellor's speech in that case.

We also consider it unnecessary to take notice, at any length, of the decisions of the House of Lords in the Queensberry cases, by which the decision of the Second Division, which had refused the claim of damages, was affirmed, and the decision of the First Division, sustaining the claim of damages by the heirs of entail, was reversed. But these judgments of the House of Lords are of the highest importance, as they adopt the principle laid down by Erskine, already mentioned, that 'where statute hath inflicted special penal-'ties upon any offence, all others are understood to be excluded.'

The case of a strict entail unrecorded was also founded on. The entail is not good against creditors, but may be good against the heir by personal exception. In squandering the estate, while he omitted to record the entail, he does a great wrong to the substitutes, nearly the same as if he had burned the entail in his possession. Besides, registration was intended by the statute merely to operate against third parties.

Upon the whole, we apprehend that the law has been so fixed upon these questions, that there is little room for controversy with respect to them; and if, contrary to our expectation, the same questions shall again be thrown open, they must necessarily affect every one of the numerous cases decided during the last forty years in which an entail has been set aside. In the sincere hope that such a general calamity may not take place, we shall conclude the statement of our opinion with the following propositions.

1. Before the introduction of strict entails in Scotland, investitures could be altered by the proprietor, in virtue of his right of property, and of the rights which followed it.

2. The introduction of strict entail was an innovation contrived by the lawyers, the effect of which was at first very little understood; and its effect remained uncertain, until the law was established by the statute 1685, c. 22.

3. During a period before that statute was passed, the conveyances were subject to implications of various sorts, many of which had no foundation in law. Many entails were supposed to be protected under the act 1621, c. 18. Some of these were in the direct form; but many of them depended upon mere implication, and sometimes upon supposed implication, assumed without grounds.

4. During the same period, prohibitory clauses were introduced, as obligations by an assumed implication, for which there were no grounds.

5. Entails, before the statute 1685, were not warranted by law; and when the statute was passed, such entails as were not warranted by it were not sufficient to bind either heirs or creditors.

Accordingly, the rule of law laid down by Erskine, and since settled by the judgments of the House of Lords in the Queensberry

cases, totally precludes, in the case of a strict entail, any other protection to the estate but the prohibitory, irritant, and resolutive clauses of the entail itself; and thus the act 1621, and every ground of implication whatever, have been rendered of no force in such a case.

But the most striking proof that the entail has no protection whatever but the prohibitory, irritant, and resolutive clauses, is the rule now so completely established, that an inhibition upon an entail is not competent.

6. Contracts of marriage proceed entirely upon implication, which is altogether inadmissible in strict entails.

7. The price of the estate has been called a surrogatum for the lands, which must be re-employed in the purchase of other lands descendible to the heirs of entail. But this is an evident mistake. The proprietor had power and right to sell the lands, which were his own property, subject to no claim whatever. If they had remained unsold, they might have descended to the next heir of entail; but having been sold, there was no condition in the entail by which the proprietor who sold them could be deprived of the price.

The only ground that can be assumed in such a case would evidently be an implied condition. But there is no such condition even implied, and any implied condition would be inadmissible.

8. It is alleged that although third parties are at liberty to purchase the entailed lands, heirs are bound by the entail, and commit a wrong in selling; but this is the worst of implications. It cannot be pretended that there is the slightest vestige of a direct or express rule in law against an heir who sells a part of his estate, and who, in doing so, is warranted by law.

9. The question among heirs is the same as the question with strangers. The law is the same with both; and the implication against the heir is as unfounded as any of the other implications.

10. Where an entail with prohibitory, irritant, and resolutive clauses is so incorrect that the proprietor has power to alienate or burden the lands, he cannot be compelled to re-employ the price or prices; and if any legal compulsitor were supposed to be competent, it would still be inefficient, because the proprietor could again alienate at any time, without notice to the heirs of entail, and by that means defeat their object, and thus the rule would apply, frustra petis.

11. Taking into consideration the foregoing propositions, either singly or collectively, the necessary conclusion is, that no entail with prohibitory, irritant, and resolutive clauses, under the statute 1685, c. 22, when the clauses are incorrect or defective, and thereby expose the entail to be defeated by sale, contraction of debt, alteration of succession, or any other defect, can be supported; nor can the prices be demanded of the heirs of entail who have sold or disposed of the estate, because, from the nature of the entail, no process can be issued against them to re-employ such prices.

12. None of the former decisions of this Court affect the question now at issue; and the opinion delivered by the Lord Chancellor in the case of Westshiells, when he remitted that case, that there was no precedent applicable to it, is perfectly well founded.

And, finally,

13. It is not surprising that such is the result of a discussion which demonstrates that every argument of the defenders rests upon assumed implication, for which there is not the slightest foundation in reality, and which, if ever at any time countenanced by some lawyers, has long been completely overruled and exploded.

LORD GILLIES concurred in this opinion.

Pursuer's Authorities.—3. Ersk. 8. 24; 1. Ersk. 7. 22; 18. Vesey, 87; Bryson, Jan. 29. 1760, (15511, and 5. Brown's Supp. p. 941); L. Ankerville, Aug. 8. 1787, (7010.)

Defenders' Authorities.—Baillie, July 11. 1734, (15501); Gardner's Creditors, Jan. 27. 1744, (15501); Hope's Min. Pr. 16. § 9, &c.; 2. Mack. 490; 2. Stair, 3. 59; 3. Ersk. 8. 23; Willison, Feb. 26. 1724, (15369); Strathnaver, Feb. 2. 1728, (15373, and Craigie and St. p. 32); Gordon, July 29. 1761, (15513); Sutherland, Feb. 26. 1801, (No. 8. App. Tailzie); Lockhart *v.* Stewart, June 11. 1811, (F. C. remitted); Earl of Breadalbane, June 12. 1812, (F. C.); Young, Dec. 7. 1705, (15483); Hay, Feb. 9. 1753, (15603); Earl of Wemyss, Feb. 28. 1815, (F. C.); Young, Nov. 13. 1761, (5. Brown's Supp. 884); M'Nair, May 18. 1791, (Bell's Cases, 546.)

GIBSON-CRAIGS and WARDLAW, W. S.—A. MANNERS, W. S.—Agents.

No. 238.

ALEX. BUIE, Pursuer.—*Skene*—*H. J. Robertson.*
LADY GORDON, Defender.—*Robertson.*
Sir JAMES GORDON, Defender.—*More.*

Husband and Wife.—Held,—That a husband having intimated to an innkeeper that he would not be responsible for any articles furnished to his wife after a certain date, was not liable thereafter for any thing further than what was necessary for her maintenance according to his rank and fortune.

Feb. 23. 1827.

1ST DIVISION. Lord Eldin. D.

ALEXANDER BUIE, vintner in Fochabers, brought an action against Sir James Gordon of Letterfourie, and a supplementary one against Lady Gordon, concluding for £237: 18: 8, conform to certain accounts commencing on the 9th of May 1821, and terminating in September 1825. The articles consisted, in a great measure, of dinners, claret, port, and other wines, with shrub, whisky, and other spirits, which appeared to have been consumed by Lady Gordon and one of her sons in the inn kept by Buie; and there were also various other charges for chaises, coach tickets, servants' victuals, &c. Against this claim Sir James stated, That although there was no legal separation, yet he and his wife lived apart from each other by tacit consent;—that she had right

to an annuity of £210 out of his estate, in terms of their contract of marriage, which was intended for her maintenance;—that the articles alleged to have been furnished were such as ought not to form a claim against him; and that, at all events, he had written to the pursuer, on the 1st of February 1824, that 'I will not pay 'or be answerable for any accounts taken on with you from this 'date, without my written order for the same;'—that notwithstanding he was willing to pay the amount then due, being £25, but that he was not bound to pay for any articles which had been subsequently contracted.

By Lady Gordon it was contended, That as she was a married woman, and was not separated from her husband, no personal liability could attach to her; and that as the annuity was not intended to defray her expenses for necessaries, the pursuer could not proceed against it, but only against the estate of her husband.

To this it was answered,

1. That as the letter could not have more extensive effect than an inhibition, Sir James must be liable for the furnishings to his wife, in so far as he could not show that he had otherwise supplied her; and,

2. That as it was not denied by Lady Gordon that she had contracted the debt, she must be responsible for it.

The Lord Ordinary found the 'defenders, Sir James and Lady 'Gordon, liable to the pursuer in that part of his accounts which 'was incurred preceding the 1st of February 1824, and in such 'parts of the accounts as had been incurred, subsequent to that 'date, for necessary articles of furnishings to Lady Gordon; but 'found the defenders not liable in any other part of the said ac-'counts.'

All parties having reclaimed, the Court 'altered the interlocu-'tor of the Lord Ordinary complained of, so far as it finds Lady 'Gordon liable for payment of the articles of the account pursued 'for, incurred prior to the 1st day of February 1824 years, and to 'that extent sustain Lady Gordon's defences; assoilzie her from 'the conclusions of the libel, and decern; and further find the 'defender Sir James Gordon liable in payment to the pursuer 'of such articles of the account pursued for, incurred posterior 'to the 1st day of February 1824, as were necessary for the 'maintenance of Lady Gordon and her family, according to her 'husband's rank and fortune, and remit to the Lord Ordinary to 'proceed accordingly; also remit to his Lordship to hear parties 'as to what other articles of the said account, contracted posterior 'to the 1st February 1824, Lady Gordon ought to be found 'liable in payment of to the pursuer out of her separate fund;

'and, quoad ultra, refuse the desire of the said three notes, and 'adhere to the interlocutor of the Lord Ordinary complained of, 'reserving the question of expenses until the issue of the cause.'

LORD PRESIDENT.—After the letter of the 1st of February 1824, the pursuer was not entitled, without the written authority of Sir James, to make any furnishings to Lady Gordon. Sir James was entitled to say to him, that he would not permit his wife to deal with *him*; and therefore I rather think, that after being so put upon his guard, he could not claim from Sir James even the expense of necessary furnishings. This is not like an inhibition; it is a notification to an individual tradesman that he was not to furnish any goods whatsoever without written authority; whereas an inhibition interdicts all and sundry from furnishing any thing else than necessaries, which this letter could not do. Even, however, if he had a claim for necessaries, there seem to be very few articles of that description in the accounts. We have sustained a claim against the husband for funds advanced to enable a wife to go to Bath on account of her health; but here chaise after chaise appears to have been hired without any definite object.

LORD GILLIES.—I observe that there is £5 charged on one day for a dinner and wines to Lady Gordon and her son.

LORD CRAIGIE.—Sir James is clearly not liable for such articles as claret, port, shrub, &c., which should never have touched the lips of this lady at his expense; but I rather think that her separate fund may be attached for the debt.

LORD GILLIES.—Sir James admits his liability prior to 1st February 1824, and I apprehend that he must also be liable for those necessaries subsequently furnished, and that Lady Gordon must be liable quoad ultra.

LORD PRESIDENT.—On reconsideration, I rather think Sir James must be liable for necessaries even after the date of the letter; because, if the articles were such as he ought to have supplied, it is jus tertii to him from whom she got them.

M'KENZIE and INNES, W. S.—MORRISON and BURNETT, W. S.—J. S. ROBERTSON, W. S.—Agents.

No. 239. G. MARR and J. STEPHEN, Suspenders.—*Jameson—Currie.* J. LOW, Charger.—*D. of F. Moncreiff—W. Bell.*

Feb. 23. 1827. 2D DIVISION. Ld. Cringletie. M'K.

THIS was a special case relative to a charge for rent, in which the Lord Ordinary suspended the letters simpliciter, and the Court adhered.

T. GRIERSON, W. S.—J. R. STODART, W. S.—Agents.

D. M'MICHAEL, Advocator.—*Sol.-Gen. Hope—Jameson.* No. 240.
H. and R. BAIRD and Others, Respondents.—*Maitland—Shaw.*

Jurisdiction.—An action in the Court of Session having been compromised, in consequence of the defender agreeing to pay expenses and a composition—Held competent to raise an action on the agreement before an Inferior Court.

Feb. 24. 1827.

1st DIVISION. Lord Eldin. H.

THE only general point involved in this case related to a question of jurisdiction. Baird and others had brought an action of reduction, on the act 1696, c. 5, of a preference over the bankrupt estate of Cullen and Company, which M'Michael had obtained, and on which they were creditors. After decree of reduction had been pronounced, and an order to account was issued, M'Michael wrote this letter to Bairds:—'On condition you will 'drop the process, and discharge your claims on the sequestrated 'estates of Daniel Cullen and Company, and Daniel Cullen as 'an individual, I will pay you two shillings per pound on your 'respective claims, and the expenses you have incurred. If any 'difference arise as to the account of expenses, it is to be settled 'by referring to a respectable neutral writer here (Glasgow,) or 'in Edinburgh.' This offer was accepted, and the process discharged. A dispute having then arisen as to whether the offer meant that M'Michael should pay the expenses incurred as between agent and client, or as between party and party, Bairds and others brought an action before the Magistrates of Glasgow, founding on the letter, and concluding for the expenses as between agent and client, subject to taxation, in terms of the agreement. Besides other defences, M'Michael objected to the competency of this action, That as it related to the expenses of a process which had depended in the Court of Session, the Magistrates had no jurisdiction to entertain it.

To this it was answered, That the action in the Court of Session was at an end, and that the present one was to enforce an ordinary civil contract, to which the Magistrates were competent.

The Magistrates having sustained their jurisdiction, and decerned in terms of the report of a writer in Glasgow, who taxed the accounts, the Lord Ordinary and the Court, in an advocation, adhered.

LORD CRAIGIE was of opinion that the action was not competent before the Magistrates, and that it ought to have been brought before the Court of Session; but the other Judges held that it was perfectly competent.

T. JOHNSTONE,—C. FISHER,—Agents.

No. 241. J. THOMSON and SONS, Petitioners.—*Sol.-Gen. Hope—Bothwell.*
J. BROOM and Others, Respondents.—*D. of F. Moncreiff—Cowan.*

Bankrupt—Sequestration.—Held incompetent to enter into objections to awarding sequestration, other than that the applicant is not within the description of persons described by the statute, or that the concurrence is not such as the statute requires, other objections forming merely a ground for recall.

Feb. 24. 1827.
2D DIVISION.
F.

THOMSON and SONS having applied for sequestration under the Bankrupt Act, Broom and others opposed it, on the ground that they had already granted a trust-deed for behoof of their creditors, to which almost the whole had acceded, and under which one instalment had been paid to the creditors. To this it was answered, That although this might found a reason for recalling the sequestration, it could not competently be stated in the present stage, the Court being bound, under the 18th section of the Bankrupt Act, to award sequestration, unless the party applying for it did not fall within the description of persons entitled thereto, or had not the concurrence required by the statute.

The Court being of opinion that they could not competently enter into the question as a bar to granting sequestration, awarded it accordingly.

J. MACANDREW,—GAIRDNER and ROBERTSON, W. S.—Agents.

No. 242. J. BUCHANAN.—*Skene—Pyper.*
J. DUNLOP.—*D. of F. Moncreiff—A. Dunlop jun.*
Competing.

Bankrupt—Sequestration.—In the election of a trustee, held no objection to the vote of a creditor, founded on bills accepted jointly by the bankrupt and another individual, that he had not valued and deducted that individual's security, the bankrupt being in fact the primary obligant, and liable to relieve the other, though not appearing so ex facie of the bills.

Feb. 24. 1827.
2D DIVISION.
Lord Newton.
F.

IN a competition between Buchanan and Dunlop for the office of trustee on a sequestrated estate, the Sheriff of the county, on a remit from the Lord Ordinary, reported that the majority of legal votes was in favour of Dunlop. The Lord Ordinary having thereafter confirmed him as trustee, Buchanan reclaimed, but confined his objections to a single vote in Dunlop's favour, amounting to £1643. This vote was founded in part on bills accepted by the bankrupt jointly with two other individuals, who, however, held letters from the bankrupt, bearing that he alone had received the value, and binding himself to relieve

them. The objection taken was, that the creditors had not valued and deducted the security of the joint obligants on the bills, which it was contended he was bound to have done, unless it had appeared ex facie of his document of debt that the bankrupt was liable to relieve the other obligants.

To this it was answered, That all which the Bankrupt Act required was, that the bankrupt should be in reality the primary obligant, and liable to relieve the others; in which case the creditor was not bound to value and deduct their security.

The Court unanimously repelled the objection, and adhered to the Lord Ordinary's interlocutor.

MACMILLAN and GRANT, W. S.—J. KENNEDY, W. S.—Agents.

W. WALKER, Suspender.—*Greenshields.*
J. GRIEVE, Charger.—*Wilson.*

No. 243.

Prescription.—A proprietor of lands having feued them, and infeftment having been taken; and having thereafter granted to the feuar a disposition of the lands with two manners of holding; and titles having been made up, and the lands possessed thereon for more than 40 years, without reference to the feu-contract—*Held* that although the property and superiority had been thus separated, yet a good prescriptive title to both had been acquired.

Feb. 27. 1827.

1ST DIVISION. Bill-Chamber. Lord Medwyn. D.

THE lands of Meikle Beath originally belonged to James Mitchell, who was succeeded by John Stewart and Henry Wardlaw, as heirs of provision. These parties obtained precepts from Chancery; and, after Stewart was infeft, he granted, in May 1702, a disposition of his half, containing precept of sasine, in favour of Wardlaw. In August of the same year Wardlaw disponed the whole to John Dewar, and in December thereafter Wardlaw was infeft in his own half in virtue of the precept from Chancery, and in the other under that from Stewart. In May 1708, John Dewar, by a disposition in a contract of marriage, disponed the whole lands to his son James Dewar, who was base infeft on the 19th of August 1730. James Dewar entered into a contract of feu with David Betson primus, by which he feued the lands to him for payment of a feu-duty, and upon which Betson was infeft. Thereafter, on the 8d of November 1735, James Dewar granted a disposition to Betson, by which he sold to him 'all and haill 'that my town and lands of Mitchell's Beath, alias Mastertown's 'or Halket's Beath, with houses, &c. together with all right, title, 'interest, claim of right, property, and possession, as well petitory 'as possessory, which I, my predecessors, authors, heirs or succes-'sors, ever had, have, or hereafter may have, claim, or pretend 'thereto,' &c.; with a double manner of holding, procuratory of

resignation, precept of sasine, and a clause of warrandice excepting from it the contract of feu.

On this precept Betson took sasine, which was duly recorded, and in 1737 he expede a Crown charter of resignation and confirmation, proceeding upon the procuratory in Stewart's disposition to Wardlaw,—on that of Wardlaw to John Dewar,—and on that of James Dewar to Betson himself, contained in the disposition of 1735, whereby all these dispositions and infeftments were confirmed; but no notice was taken of the feu-contract; and on the 2d of May 1737 Betson was infeft in virtue of the precept of sasine contained in the charter.

In 1749 Betson, in implement of a previous onerous contract, disponed the lands, with procuratory and precept, and clause of absolute warrandice, to his eldest son, David Betson secundus, who was immediately infeft on the precept.

By David Betson secundus the lands were disponed in 1787 (also with procuratory and precept, and clause of absolute warrandice) to his son, David Betson tertius, who at the same time took sasine on the precept, and duly recorded it; and on the 2d of June 1813 he expede a Crown charter of confirmation, confirming the whole titles by which the lands had been transmitted since the date of the Crown charter in 1737.

Having got involved in pecuniary difficulties, David Betson tertius granted (previously to the confirmation, but in the course of the same year) a disposition, containing precept of sasine, in favour of trustees for his creditors, on which they were infeft. His estates having been afterwards sequestrated under the Bankrupt Act, the voluntary trustees, with his consent, disponed the lands in favour of Walker, the judicial trustee, who was infeft in October 1817. Walker having died, the lands were, by special decree of adjudication, transferred to his successor Black, who expede a Crown charter of adjudication and confirmation in favour of himself as trustee, confirming the disposition by David Betson tertius to the voluntary trustees, and also that by them to Walker, and relative sasines. The precept in this charter was allowed to remain open; and after the death of Black, and also of another trustee, the lands were, by the usual decree of adjudication, with the charter, transferred to Grieve, who had been appointed trustee. Having been sold by public roup to the suspender, Grieve offered to him, as a title, an assignation to the unexecuted precept of sasine in the Crown charter of adjudication, and delivery of the whole titles back to 1737. After, however, the suspender had paid part of the price, he discovered the existence of the feu-contract and infeftment in favour of David Betson primus in

1780; and he then presented a bill of suspension as of a threatened charge, in which he contended,

1. That as the dominium utile had been thereby separated from the dominium directum, and as no consolidation had ever since taken place, the dominium utile or property still remained in hæreditate jacente of David Betson primus, and therefore the title which was offered to him was merely a conveyance of the dominium directum or superiority; and,

2. That as the bankrupt David Betson tertius had a son, he might, by serving himself heir to David Betson primus, and passing over his own father and other ancestors, make up titles to, and carry off the property; or this might be done by his creditors.

To this it was answered,

1. That as the feu-contract must be held as having been delivered up to David Betson primus at the date of the disposition to him in 1735, and as he and his successors had since that period possessed the lands on titles ex facie absolute, that contract was extinguished by the negative prescription, and the right to the lands fortified by the positive prescription; and,

2. That even if the lands were to be considered as still in hæreditate jacente of David Betson primus, the son of the bankrupt could not serve himself heir without becoming bound to implement the several clauses of warrandice granted by his intermediate ancestors.

The Court, on the report of the Lord Ordinary, refused the bill of suspension.

Lord Balgray.—The very point in question was decided in a case which has not been noticed by the parties, Bruce *v.* Bruce, 6th December 1770 (10805,) and which was affirmed on appeal. In that case the Court were clearly of opinion, that although there had been at one time a separation of the property and superiority, yet, as the title conveying the superiority included the whole lands, and was ex facie applicable to the property, and as there had been more than forty years possession, this was a sufficient prescriptive title.

Lord Craigie.—I certainly was of opinion that the objection was good, and I rested it upon the case of Bald *v.* Buchanan; but I have been a good deal affected by the decision referred to by Lord Balgray.

Lord Gillies.—In the case of Bald there was no prescriptive possession.

Lord President.—Independently of the authority referred to, I am satisfied that the objection is not well founded. It is a mistake to say that a party is infeft in the superiority; he is not so; he is

infeft in the *lands* themselves, and that infeftment forms a good title of possession, on which he may found prescription. So much is this the case, that if a feu-right be granted, it merely creates a burden which may be extinguished by a resignation ad remanentiam, without any new infeftment being taken, because the party is already infeft.

Suspender's Authorities.—Bald, March 8. 1786, (15084); Younger, Nov. 1665, (10927.)

Charger's Authorities.—3. Ersk. 7. 8; Ogilvie v. Ogilvie, May 20. 1803, (not rep.)

J. BURNESS,—D. WILSON, W. S.—Agents.

No. 244.

Dr. J. Low and Others.—*Sol.-Gen. Hope—M'Neill.*
BALLINGALL'S TRUSTEES.—*Baird—Small Keir.*

Competing.

Feb. 27. 1827.
2D DIVISION.
Lord Pitmilly.
M'K.

THIS case involved merely a question of fact. The Lord Ordinary preferred Ballingall's trustees for their total claim, but the Court found them entitled only to one half.

J. BOWIE, W. S.—J. YOUNG, W. S.—Agents.

No. 245.

H. Gow, Advocator.—*Cockburn—Lumsden.*
W. M'DONALD.—*Rutherfurd.*

Oath on Reference.—Oath on reference by a managing partner of a company that, 'to the best of his knowledge, a customer had paid all the articles furnished to 'him, and that all the furnishings were entered in the company's books, although 'an error may have occurred'—Held not exclusive of a claim for the price of furnishings proved to have been delivered, but omitted to have been charged in the books.

Feb. 27. 1827.
2D DIVISION.
Ld. Cringletie.
M'K.

Gow, as partner of, and having right to receive and discharge the debts due to the concern of Alexander Reid and Company, brewers in Edinburgh, raised an action before the Sheriff against M'Donald, a spirit-dealer, for payment of four half hogsheads of ale said to have been furnished to him on the 10th of April 1821, and omitted to be charged in an account subsequently rendered and paid. It was established by the proof led by Gow, that, on the day in question, *eight* half hogsheads had been delivered to M'Donald, while only *four* were charged against him in the books of the company. M'Donald then made a reference to the oath of Reid, who had been the managing partner of the concern; and he having deponed 'that M'Donald paid the whole ale furnished to 'him by A. Reid and Company, to the best of deponent's know-

'ledge,' and also that, 'to the best of his knowledge, all the ale 'sold and delivered by Reid and Company to M'Donald was re-'gularly entered in the books of Reid and Company, although 'an error may have occurred, but he is not sensible of any such 'error,' the Sheriff assoilzied M'Donald.

Gow thereupon brought an advocation, in which the Lord Ordinary found that Reid's deposition 'is not exclusive of the claim 'for payment of four half hogsheads of ale furnished by A. Reid 'and Company, and omitted to be charged to him;' and that M'Donald was liable for the price accordingly. The Court unanimously adhered.

J. Young,—A. Pearson, W. S.—Agents.

G. Mickle, Suspender.—*D. of F. Moncreiff—Sandford.*
C. Barnett, Charger.—*Jeffrey—G. Napier.*

No. 246.

Feb. 28. 1827.

1st Division. Admiralty. H.

This was a claim of damages by Barnett against Mickle for an alleged violation of a charter-party by the latter, and which depended on a matter of fact. The Judge-Admiral decerned against him, but the Court suspended the letters simpliciter.

A. M'Intyre,— G. and W. Napier, W. S.—Agents.

J. M'Culloch, Suspender.—*Skene—Whigham.*
A. M'Nilidge, Charger.—*Jameson.*

No. 247.

Process—Poinding.—An arresting creditor having raised a summons of forthcoming, concluding for decree against the arrestee, to which the common debtor was called; and decree having been pronounced against the arrestee and the common debtor for his interest; and horning having been raised thereon, and a poinding executed of goods in the possession of the common debtor, which were afterwards sold to a third party; and decree for their value having been obtained by the poinder against that party, who brought a suspension, on the ground that the poinding was inept, in respect it was not competent to poind the goods on a mere decree of forthcoming against the common debtor for his interest; the Court, in the special circumstances, repelled the objection.

Feb. 28. 1827.

1st Division. Lord Eldin. D.

On the 4th of April 1822, M'Nilidge obtained a decree before the Sheriff of Wigton against John M'Dowall for a debt of £26. 14s., with expenses. In virtue of this decree he arrested in the hands of one Stewart, as indebted to M'Dowall; and he then raised a summons of forthcoming before the Sheriff, in which, after narrating the decree and arrestment, he concluded thus:—'Therefore the said Hay Stewart, (in whose hands the said ar-'restment was used,) defender, ought and should be decerned

'and ordained to make furthcoming payment and deliverance 'to the pursuer of as much of the sum and others so arrested in 'the hands of the said Hay Stewart, as will completely satisfy 'and pay the pursuer the sums of money, principal, interest, 'expenses, and dues of extract, contained in the decreet and 'diligence before narrated.' There was, however, no conclusion against M'Dowall, who had been only mentioned in reciting the decree, and the Will merely bore an order to cite 'the de-'fenders.'

Decree, in terms of the conclusion to make forthcoming to the extent of the debt and expenses, was pronounced against Stewart, and against M'Dowall for his interest, and against the latter personally for 30s. of expenses. On this decree of forthcoming M'Nilidge raised letters of horning, which, after reciting it, proceeded thus:—'Our will is herefore, that in our name and authority ye 'command and charge the said Hay Stewart, arrestee, and John 'M'Dowall, common debtor, for his interest, personally or at their 'respective dwelling-places, to make furthcoming payment and 'deliverance to the complainer of as much of the sums of money 'and other effects arrested in the said arrestee's hands as afore-'said, as will pay the whole of the sums of money before speci-'fied, excepting the expenses of process and the dues of extract-'ing; and that ye also charge the said common debtor to make 'payment to the complainer (the said charge to be also person-'ally or at his dwelling-place) of the said sum of 25s. of expenses 'of process of furthcoming, and 5s. 4d. as the dues of extracting 'the said decree therein.'

Under these letters M'Nilidge, in June 1823, executed a poinding of the household furniture of M'Dowall, which was in his own possession. But, immediately thereafter, the mother of M'Dowall, designing herself liferentrix of the house in which he resided, and stating that he was owing a rent of £20, presented a petition to the Magistrates of Stranraer, praying for a sequestration and warrant to sell. Sequestration of the furniture was awarded; and no appearance having been made, warrant was granted on the 24th of June to sell on the 28th. On the former of these days, M'Nilidge had reported his poinding to the Sheriff, and got a warrant of sale; and having discovered the proceedings before the Magistrates, he applied to them, stating that Mrs. M'Dowall had no title to the house, and that no rent had ever been payable, and praying for interdict, or that she should be ordained to lodge in Court the proceeds of the sale. The Magistrates granted warrant to intimate this petition to her, and appointed her, before carrying the sale into execution, to produce her title. On the

same day, however, the effects were exposed to public sale in one lot, and sold to the suspender M'Culloch for £30. Intimation of the order of the Magistrates was also made; but whether this was before or after the sale, did not appear. A multiplepoinding having then been raised before the Magistrates by Mrs. M'Dowall, relative to the balance of the proceeds after paying the rent and expenses, and in which she represented that she was not liferentrix, but executrix of her husband, the Magistrates found her liable only in once and single payment, and appointed parties to lodge their claims; but no further procedure took place. At the same time M'Culloch presented a petition, stating that he had purchased the effects, but that M'Nilidge was threatening to sell them under the warrant of sale from the Sheriff, and praying for an interdict. According to a rule in the Burgh Court of Stranraer, he lodged a bond of caution to make the goods, or their price, forthcoming to the extent of the debt, in the event of its being found that he had applied wrongously for interdict. The Magistrates granted interdict; but afterwards found that Mrs. M'Dowall had no title to apply for sequestration and sell the effects, and recalled the interdict applied for by M'Culloch. M'Nilidge then moved them to find the bond forfeited, and decern against M'Culloch to make the goods forthcoming, or to pay the debt of £26. 14s. and expenses, which they accordingly did, and at the same time conjoined all the processes which related to the subject.

M'Culloch having been charged on this decree, he brought a suspension, in which he contended,

1. That as there was no conclusion in the summons of forthcoming against M'Dowall, the common debtor, it was not competent to pronounce any decree against him; and at all events, as the letters of horning proceeded upon the decree of forthcoming, which was directed against the arrestee and only against M'Dowall for his interest, it was not competent to attach the furniture of M'Dowall, which was not in the possession of the arrestee, but of M'Dowall himself, and therefore the diligence was inept; and consequently M'Nilidge had no title, as a poinding creditor, to apply for a forfeiture of the bond, and to insist in the charge; and,

2. That the proceedings before the Magistrates were irregular, as they had conjoined processes, some of which were out of Court, and others were between different parties, and had on M'Culloch's own petition decerned against him; and therefore the charge which rested on these proceedings could not be sustained.

To this it was answered,

1. That as the diligence proceeded on a debt due by M'Dowall himself, M'Nilidge had a good title to poind his effects; and that as the diligence could not have been objected to by him, and as M'Culloch was a mere interposed party, set forward by M'Dowall to attempt to defraud M'Nilidge, he was barred from objecting to the diligence; and,

2. That by the nature of the application to the Magistrates by M'Culloch, he agreed that decree should be pronounced against him in terms of his bond, if it should be found that he had wrongously applied for interdict; and as it was found that he had done so, no objection could be stated to the regularity of the procedure.

The Lord Ordinary 'repelled the pleas stated for the suspender, that the charger's diligence, and the proceedings before the Magistrates of Stranraer, were inept or irregular, and remitted the case to the Jury Court;' and the Court, after entertaining much doubt as to the regularity of the diligence, but considering that the case seemed involved in fraud, adhered.

R. WELSH,—J. MORISON,—Agents.

No. 248. EARL of STAIR, Pursuer.—*D. of F. Moncreiff—H. J. Robertson.*
EARL of STAIR'S TRUSTEES, Defenders.—*Sol.-Gen. Hope—Murray.*

Trust.—A party having by a trust-deed conveyed his whole funds, interest and proceeds thereof, to trustees, to be vested in lands which were to be annexed to his entailed estate; and the heir-at-law and of tailzie having claimed the interest of the fund not invested in land from and after the expiration of a year from the death of the truster; and the Court of Session having assoilzied the trustees from the claim, and the House of Lords having remitted to take the opinion of all the Judges, the Court, on advising these opinions, adhered.

March 1. 1827.
1st DIVISION.
Lord Eldin.
D.

JOHN EARL of STAIR made an entail of his lands of Culquhasen and others in Scotland, and thereafter, on the 18th of December 1815, he executed a trust-disposition and deed of settlement in the Scottish form, by which he conveyed his whole estates, real and moveable, (excepting those included in the entail,) to trustees, for payment of his debts, and of certain special legacies, and of any other he might afterwards bequeath. There then was the following declaration:—'And after my debts and 'legacies are all paid, and a sum set apart for payment of the 'annuities, or the same are otherwise well secured, I appoint my 'said trustees and their foresaids to lay out the residue of the 'trust-funds, and interest and proceeds thereof, in purchasing 'lands in the shires of Wigton and Ayr, or stewartry of Kirk-

'cudbright, and at the sight and with the advice and consent of 'the Lord President of the Court of Session, and of his Majesty's 'Advocate for Scotland for the time being, to annex the same to 'my entailed estate, by taking the rights and securities of the 'lands so to be purchased, to the same heirs of tailzie, and under 'the same conditions, provisions, clauses irritant and resolutive, 'contained in the disposition and tailzie of my lands of Cul-'quhasen and others executed by me; and I appoint my said 'trustees and their foresaids to expede charters and infeftments 'thereon in favour of the heirs of tailzie, and under the condi-'tions foresaid, and to get the dispositions thereof recorded in the 'register of tailzies; and for the more regular management of the 'said trust, I hereby authorize and empower the said trustees to 'appoint cashiers and factors under them, and to give salaries to 'each of them, and such gratifications to any other persons that 'may be employed by them in relation to the premises, as they 'shall think fit.' The deed concluded by nominating the trustees to be his executors.

Thereafter, in 1819, he made a will in the English form, by which he bequeathed certain legacies, one of which was not to be payable for six months after his death, and then the deed bore—'And as to all the rest, residue, and remainder of my personal 'estate in England, which shall not consist of real or Government 'securities, I do direct my executors to convert the same into 'money, and after payment of my just debts, to invest such money 'in Government securities; and I hereby give and bequeath all 'such stock, together with all other stocks, funds, and securities 'of which I may be possessed at the time of my death, to such 'uses and for such purposes as I have, in and by a certain deed 'and writing prepared according to the Scotch form, executed 'by me, and bearing date the 18th day of December 1815 'years, declared of and concerning my personal estate; and as 'to all estates which at the time of my death shall be vested in 'me upon my trusts whatsoever, or by way of mortgage, I do 'hereby give, devise, and bequeath the same unto the trustees 'there named.'

Lord Stair died on the 1st of June 1821, without heirs of his body, and the trustees thereupon took possession in virtue of the trust-deed. His heir-at-law, both in his real and personal estate, was John William Henry Earl of Stair, who was also his nearest heir-male of tailzie and of provision, and as such was served and retoured to the lands embraced in the entail.

In November thereafter, (being about five months after the death of the late Earl,) the present Earl raised an action, in which,

after founding on the trust-deed and relative will, and stating that he had right to the interest of the capital sum left by the late Earl, amounting (after deduction of debts and legacies) to £200,000, from and after the period of his death, he concluded that the trustees should be ordained 'to hold just count and 'reckoning with the pursuer for the whole interest, dividends, 'and proceeds of the real and personal estate of the said John 'Earl of Stair, that has arisen from and since the said 1st day of 'June last, or that may arise thereon,' and to make payment accordingly. In defence, the trustees maintained, That the claim was, from the nature of the deed, unfounded, and that at all events they had not been guilty of any undue delay. The Lord Ordinary and the Court assoilzied them on the 12th of February 1823;* and this judgment was affirmed by the House of Lords on the 7th of March 1825, on the ground that the demand had been prematurely made.

Lord Stair then raised another action against the trustees, subsuming 'that the pursuer, as heir of entail aforesaid, is entitled 'to the whole interest, dividends, and profits arising from the 'said real and personal estate, from and after the 1st of June '1822, being twelve months after the death of the said Earl of 'Stair, and in all time thereafter during the life of him the said 'pursuer, until the said real and personal estate be invested in 'manner directed by the foresaid trust-disposition;' and concluding, that the defenders should be decerned and ordained 'to hold 'just count and reckoning with the pursuer for the interest, 'dividends, and proceeds of the real and personal estate of the 'said John Earl of Stair, that have arisen from and since the 'said 1st day of June 1822, or that may arise hereafter thereon, 'until the said real and personal estate be invested in manner 'aforesaid, and to make payment to the pursuer of the balance 'that may arise on such accounting, or otherwise to make pay-'ment to the pursuer of the sum of £10,000 annually, aye and 'until the termination of the foresaid trust, and the said defenders 'be discharged of their actings and proceedings under the same.'

In defence, the trustees stated, That it was Lord Stair's intention, declared clearly and legally, according to the law of Scotland, that his trustees should lay out the residue of the trust-fund, and whatever interest should arise from the trust-fund, while under their management, as an accumulated sum in the purchase of lands; that no charge of mora attached to them, for although £35,000 of the £200,000, being the amount of the fund, was

* See ante, Vol. II. No. 187.

uninvested, yet that had not happened from their neglect, but from the impracticability of procuring an eligible investment in the limited district pointed out by the deceased.

The Lord Ordinary, on hearing parties, found, 'That no intention is indicated by the settlement of the testator to the effect 'that the trust-estate was to be enlarged by accumulation; that 'four years having elapsed since the death of the testator, it is 'presumable that sufficient time has been allowed for the purchase 'of land to be entailed according to the direction given by him; 'and in respect of the delay that has taken place in making these 'purchases, and that there is no law or equity for subjecting the 'pursuer to a loss of the whole proceeds and issues of the fund 'unemployed in consequence of such delay, that it is the duty of 'the trustees, and that they are bound by law to give a reasonable indemnity to the pursuer for the loss which he has sustained, and is likely to sustain, by such delay; and therefore appointed the pursuer to give in a condescendence of his claim 'against the trustees upon that ground.'

But the Court altered, and assoilzied the trustees on the 21st of February 1826, 'in respect that the testator has directed that 'the whole of the produce of the trust-estate, both principal and 'interest accruing thereon, shall be laid out in the purchase of 'land; and that the present is the first attempt made in Scotland 'for having any part of the trust-estate allotted to the heir in the 'mean time, under such circumstances; and also in respect there 'has been no undue delay upon the part of the trustees in laying 'out the trust-funds, as appointed by the truster.'*

Lord Stair having appealed,

The House of Lords ordered, 'That the said cause be remitted 'to the Court of Session in Scotland, to review generally the interlocutor complained of; and it is further ordered, that the 'Court to which this remit is made, do require the opinion in 'writing of the other Judges of the Court of Session on the 'whole matters and questions of law which may arise in this 'cause, which Judges are so to give and communicate the same; 'and after so reviewing the interlocutor complained of, the said 'Court do and decern in the said cause as may be just.'†

In consequence of this order, the written opinions of the Judges were taken, and the Court thereafter by a majority adhered.

Lords Justice-Clerk, Glenlee, Pitmilly, and Newton, delivered this opinion:—In delivering an opinion 'on the matters and

* See ante, Vol. IV. No. 316.

† See Wilson and Shaw's Appeal Cases, 24th May 1826, p. 421.

'questions of law which occur in this case,' we begin by noticing what we conceive to be the regulating principles of decision in general in all such cases.

The general rule must be, to be guided by the will and intention of the testator or truster in every case in which his intention is either clearly expressed, or can be legally inferred from the terms of the deed. Hence flows the rule which, we apprehend, would be followed in this country, as it is said, in the pursuer's Case, to be in England, that 'when there is a trust, that is always considered as 'done which is ordered to be done.' The existence of this rule is surely a strong proof that the intention of the truster must form the regulating principle of decision.

We next observe, that in the law of Scotland there is no general rule of equity, so far as we know, fixing any particular period of time, from the death of the truster, at which the interest of trust-funds must be paid to the heir. Such a rule might, on the one hand, be attended with a certain degree of convenience; while, on the other, we should find it very difficult to adopt any one period as applicable to all cases, however varied from each other in their circumstances. But we are not aware of the existence of any such rule; and we doubt the powers of the Court, consistently with the law of Scotland, to fix any such.

Accordingly, the Lord Ordinary in this case, by whose interlocutor the trustees were found to be under an obligation to indemnify the pursuer for the loss sustained by him, has not rested this obligation on any general rule of equity applicable to all cases of trust; but on the special circumstances occurring in this case, 'that four years 'having elapsed since the death of the testator, it is presumable that 'sufficient time has been allowed for the purchase of land.' The pursuer's claim is thus put on the delay which has occurred in this particular case.

Whether this principle can justly be applied in the circumstances of the present case, is a point on which we shall afterwards say a few words. At present we readily admit, that there is no doubt of the existence, in the law of Scotland, and in the practice of this Court, of the principle referred to by the Lord Ordinary. Whenever a case can be made out of great delay on the part of trustees, beyond the period contemplated in the trust-deed, from whatever causes the delay has arisen, the Supreme Court may interfere with its equitable powers, to prevent the heir from suffering loss, contrary to the manifest intention of the truster; and this may be done either by giving the heir the interest of the trust-funds, as a surrogatum for the rents, on the principle referred to in Lord Alloway's interlocutor in the former action between these parties, or in the shape of damages, on the principle recognised in the interlocutor of Lord Eldin above noticed.

Since, therefore, the purpose and intention of the truster must

form the regulating principle of decision, we proceed, in the next place, to remark that the intention of the truster, that his heir shall draw the interest of the trust-funds, or a certain annuity therefrom during the period that may elapse before they are appropriated to the purchase of land, is sometimes directly expressed by a clause to this purpose in the deed; or this purpose would perhaps be legally inferred from the truster fixing, in pointed terms in the trust-deed, a precise period for the appropriation, after which, if the funds are not actually appropriated, it may be presumed (and this seems to be taking the most favourable view for the heir) to have been intended that his heir should enjoy the interest of the trust-funds till an appropriation takes place. To such a case as this last supposed the maxim already referred to may, in our opinion, be applied in favour of the heir, that, when there is a trust, 'that is always considered 'as done which is ordered to be done.'

In the present case, the trust-deed does not destine the interest of the trust-funds, or any part of them, to the pursuer, by any direct and positive conveyance to this purpose. It is necessary, therefore, to consider whether the pursuer's claim is supported by a declaration in the trust-deed, that the appropriation of the trust-funds shall take place at a certain fixed period of time.

We are humbly of opinion that the clause in the trust-deed will bear no such construction, if regard is had to the principles on which similar clauses in other trust-deeds have been uniformly interpreted. We think it evident that the clause on which the question turns leaves a considerable latitude of time in the discretion of the trustees, and it also appears from other clauses in the trust-deed, and relative settlement, that the truster contemplated the elapse of a much longer period than that which is mentioned in the conclusions of the summons, or even than the period which has yet run from the truster's death, before the appropriation of the whole of the trust-funds could take place.

The clause referred to is in these words:—'And after my debts 'and legacies are all paid, and a sum set apart for payment of the 'annuities, or the same are otherwise well secured, I appoint my said 'trustees, and their foresaids, to lay out the residue of the trust-'funds, and interest and proceeds thereof, in purchasing lands in 'the shires of Wigton or Ayr, or stewartry of Kirkcudbright, and at 'the sight, and with the advice and consent of the Lord President of 'the Court of Session, and of his Majesty's Advocate for Scotland 'for the time being, to annex the same to my entailed estate,' &c.

This clause does not bear that the appropriation shall take place immediately after the debts and legacies are paid, or as soon thereafter as possible;—it does not contain any expressions (such as occur in other trust-deeds) which may, in some degree, limit the discretionary powers of the trustees. On the contrary, all that is said is, that the trustees shall lay out the money, after the debts and legacies

are paid, which is little more than saying that this shall not be done before the debts and legacies are discharged, and leaves great latitude to the trustees.

And truly the occasion for such discretionary powers being vested in the trustees was urgent. Large sums of money, amounting, it is said, to about £200,000, were to be employed in the purchase of land, and the purchases were to be confined to three counties. It was quite impossible that this could be done immediately, after the payment of the debts and legacies, or immediately after the lapse of a year from the truster's death.

Accordingly, the truster evidently contemplated the elapse of a longer period. By his English will he directs his executors, 'after 'payment of my just debts, to invest such money in Government 'securities; and I hereby give and bequeath all such stock, together 'with all other stocks, funds, and securities, of which I may be pos- 'sessed at the time of my death, to such uses, and for such purposes, 'as I have in and by a certain deed and writing, prepared according 'to the Scotch form, executed by me, and bearing date the 18th day 'of December 1815 years, declared of and concerning my personal 'estate;'—and by the trust-deed, 'for the more regular management 'of the said trust, I hereby authorize and empower the said trustees 'to appoint cashiers and factors under them, and to give salaries to 'each of them, and such gratifications to any other persons that may 'be employed by them in relation to the premises as they shall think 'fit.'

It appears to us to be a principle established in the practice of our Courts, to interfere with the discretionary powers vested in trustees acting under trust-deeds only in very particular cases, and when it is made evident that the heir is suffering a disadvantage, contrary to the intention of the truster.

On the whole, then, when we apply to this case the principles on which alone a Court of Equity can in this country interfere in such a case, viz. that the truster has intimated his purpose in favour of the heir's claim, and that the appropriation of the funds has been delayed beyond the period contemplated by the truster, we are humbly of opinion that no sufficient grounds for the interference of this Court are made out, and that the interlocutor of the Court ought to be adhered to.

Lords Meadowbank, Mackenzie, and Medwyn, delivered this opinion:—In giving an opinion on this cause, we think it best to begin by taking, first, a more abstract case, and considering what appears to be the law of Scotland applicable to it. The case we take is this: A. B., mortis causâ, dispones property to trustees, and directs them to turn the property into money, and then to employ it, with all interest or profits arising upon it, in purchasing land in Scotland, or in a certain county or counties, and to dispone this land, under strict entail, to a certain series of heirs. Supposing

these circumstances, we shall then suppose that the trustees of A. B. acting fairly, and not negligently, take a certain time to turn the property into money, and a certain time to turn the money into land, and to convey it under entail as directed, but do not take more time than may fairly be presumed to have been contemplated by the granter of the trust-deed, as likely to be occupied in such operations.

In these circumstances, we inquire, Has the disponee or institute of the entail any claim for interest or profits accruing on the property or money while in the hands of the trustees? Can he claim the profits or interest from the death of the truster, or from the time of the conversion of the property into money, or from any arbitrary period? Now, we cannot see any principle on which any such claim can be supported. It seems to us directly in the face of the will or intention of the truster, who, contemplating the elapse of such portions or portion of time, and the consequent acquisition of profits or interest by the trustees, did not direct the payment of these, or any part of them, to the first disponee or institute of entail, but, on the contrary, did direct the employment of them in the purchase of land to be entailed. This seems to us free from any doubt.

But let us suppose, further, that while the trustees of A. B. are still acting fairly, and not negligently, nevertheless, from emergent circumstances, the time taken by them in converting the property into money, or in purchasing the estate to be entailed, turns out to be certainly much greater than can be fairly presumed to have been contemplated by the truster,—Can we still say that the disponee of entail is to have no claim for payment of any part of the profits or interest? Put the case, for instance, that the property to be turned into money is mercantile stock of a particular kind, of which it happens, in a way there is no reason to think was contemplated by the truster, that a glut of long continuance occurs in the market; and then, that the direction being to buy land in one particular county, it turns out that there already exists a similar trust for the acquisition of land in that county, with ampler funds, and more enlarged powers,—or a very opulent family determined to buy up land there, whereby it is not possible for the trustees of A. B. to convert the property into money, and get land fit for an entailed estate in that county in less time than forty or fifty years,—in such a case, Can we say that the first person or persons favoured under the trust are to have no remedy at all? We do not see any necessity for this. We think that the rule of equity comes in, viz. that where the means adopted by a testator turn out inadequate or unfit, and are likely to produce a result beyond all question contrary to his intention, and which, if he could have foreseen it, the object he had in view shows he would have specially provided against, a remedy ought to be given, by the adoption of some other expedient or arrangement, bringing things more nearly to what he did intend; and, in the application of this rule, no arrangement seems so good as that

of giving to the disponee or heirs of entail, not the annual interest of the trust-funds, but such a share of the profits or interest accruing after a certain time as may be, in fair presumption, equal to the rents which it appears certain the granter of the trust intended and contemplated that they should receive from the entailed estate in the same time. This, we think, is manifestly better than forcing the trustees to violate the true meaning of the truster's directions, by selling or buying at an enormous disadvantage, or not acquiring proper subjects for entailing. It is true, that, in order to warrant this remedy, a clear case must be made out; but if that be done, we do not see why a remedy should be refused. It is, we think, not necessary to inquire whether the trustees ought to grant this remedy at their own hands, or wait till they have the authority of this Court. We incline to think, that, if they did it at their own hands, they would be justifiable; but this we think clear, that, in any case of real unaffected difficulty, trustees may, for their own safety, refuse to yield to a doubtful claim, till they shall be ordained by a competent Court to do so.

We are the more confirmed in the above opinion, because we see it admitted on all hands, that in a third view a remedy of this very kind must be given, viz. where the ultra delay arises from the fraud or negligence of the trustees. And yet we see no reason for this, except that it is clear that the testator did not calculate upon such fraud or negligence; for, if he had chosen to say expressly that it was his will that the trustees were absolutely to take their own time, however long, according to their own free pleasure, without question by the disponees or heirs of entail, who were to have right to nothing but the entailed estate, at whatever time it should happen to be acquired, we do not see how any redress against their delay could be obtained by these parties, being merely gratuitous claimants under the will of the testator.

It is said there is no Scotch decision admitting such remedy where the trustees act fairly; but as little do we see any Scotch decision refusing it. And as to practice extrajudicial, we doubt if there has been much, or indeed any, in clear cases of a gross and palpable ultra delay, where yet the trustees were acting fairly. Such cases are, we imagine, rare; and we have no idea that there have been so many of them as to constitute an extrajudicial practice of any great weight.

Our view, therefore, of the law of Scotland is, that, under such trusts, wherever it can be shown with certainty that a delay, much beyond the contemplation of the granter of the trust, has been or is to be incurred, whether by the fraud or fault of the trustees, or by other causes, a remedy must be given, by payment to the disponee or heirs of entail of a portion of the profits or interest accruing during the time of such delay, but that no remedy can be given without certain

proof of such excessive delay; and that the onus of showing such excessive delay lies on the claimant of the remedy.

But then it is said, that in England the difficulties of extricating cases of a similar kind have been found so intolerable, that the Court of Chancery has been obliged to fix an arbitrary time, after which the profits or interests are paid over to the party in whose favour the trust is directed to be executed; and it has been suggested that we should consider whether in Scotland a similar expedient ought not to be adopted. We speak on this subject with diffidence; but we think we see enough in the reported speech of a noble person to induce us to doubt whether the English Court of Chancery was originally led into that course by any absolute necessity of a judicial kind, and whether the expediency which did exist was not rather for the consideration of the Legislature; and at any rate, we humbly conceive that no such necessity presses upon us in Scotland. We are relieved from it, we think, by the consideration that we are not called on to interfere at all, except where the excess is plain and great, and the remedy clear. If that is not made out, we ought, we think, not to interfere. If it be made out, we cannot see that our interference will be attended with extreme difficulty; nor do we think that, under such a rule, there is any danger of excessive litigation in such cases. Indeed, we humbly conceive, that cases of the kind now before us are by no means of a nice and delicate nature, if we are to be guided in them, as we think we must be, by regard to the intention of the truster. They are cases in which we think we may safely say that the truster has no very curious or anxious attention to the immediate interests of the disponee, or any particular heir or heirs of entail. His grand object, like that of all entailers, is the preservation of his own name, and his own arms, and the endurance of an estate of his own forming, in a line of his own dictating. If he attain this object, he cares very little about the interests of individuals. Such being in general the mind of the truster in such cases, it must next be admitted that such views are certainly legal in Scotland. Entails are expressly authorized by statute, and a person having no right of succession, but by virtue of a trust, cannot possibly object to the conditions of the gift, nor pretend to complain, that what the granter of the trust chooses to give him is not equitable. The intention of the truster being, therefore, the ruling principle in such cases, and that intention being in general of the nature above mentioned, it seems quite plain that there can be no ground for our interference in execution of such trusts, for the purpose of preventing hardship to the disponee, or any individual heir, unless the occasion and extent of such interference are made certain and plain. We cannot think, therefore, that we shall find any difficulties in such cases, and assuredly we have found none yet sufficiently great to induce us, acting only as a Court of Justice, to do a thing so very strong, as to fix one arbitrary period to be taken as a presumptive term in all cases

of this sort without discrimination. If this be expedient, and fit to be done at all, at least we think it ought to be done by an act of the Legislature.

Having said so much on the law generally, we come now to this particular case, on which our opinions are to be given. In this case, then, it appears to us quite clear, in the first place, that the truster, the late Lord Stair, has directed the profits and interest accruing, down to the time when the land to be entailed shall be purchased, to be employed along with the original capital in that purchase. Notwithstanding that, however, if we thought there was sufficient evidence, either of any failure of duty on the part of the trustees, or of any emergent circumstances, by which, without any blame on their part, the acquisition and conveyance under entail of land to the present Lord Stair was delayed much beyond the contemplation of the granter of the trust, we should think that relief ought to be given, by ordaining a payment to be made to the pursuer in the mean while out of the interest of the trust-funds; but we see no sufficient evidence produced or offered to that effect. On the contrary, when we consider the largeness of the funds which are directed to be invested in land;—that this land is limited to three counties only;—that it is to be annexed to the estate of the truster, already entailed, by new deeds of entail, which are to be approved of by the Lord President and his Majesty's Advocate, we are strongly persuaded that the progress of the trustees has been quite as speedy as the truster contemplated, and that the pursuer has suffered no hardship whatever to which the truster did not fully mean to expose him. Indeed the case is one where there is singularly little reason to complain of any hardship from the fair execution of the trust. The length of time taken up, in order to the full conversion of the funds, has been required mainly from the greatness of them, the institute having the benefit of the gradual conversion as it goes on.

It has been asked, What must have been done if the conversion of the funds had taken so long a time, that the institute had died before receiving any benefit from it? Looking to the mind of the truster, as a Scotch entailer, we should say that, provided the trust was fairly executed, and executed without any excessive emergent delay, it was a matter of indifference to him whether the first institute, or any particular heir of entail, ever derived any benefit from this trust or not. But considering the powers which the trustees have of converting the funds by degrees into entailed land, there was little chance of this happening, nor has it happened, nor can any thing like it happen now. In short, supposing we were told that, among the papers of the late Lord Stair, there had been found a writing by himself, in which he had traced out prophetically, but explicitly, what he expected to be the course and progress of the disposal of his funds; and supposing that, without being shown this evidence, we were asked to guess what time he had set down as

likely to be employed by his trustees in vesting these funds in land, and entailing it as directed, we should certainly guess, not a shorter time than that which has been employed by them, but quite the contrary; and, in that view, we see no principle of the law of Scotland on which we are authorized to interfere at all in this case.

Lords Alloway and Eldin delivered this opinion:—This is a question of much importance, and, in the absence of all precedents, our judgment must be entirely founded upon the equally sure and often preferable basis of principles. By applying these to the case now before us, we shall be enabled to pronounce a sound decision.

It is the duty of every Court to give effect to the precise words of the testator; and if Lord Stair had used expressions calling upon his trustees to accumulate the interest which might arise from the funds in their hands, previous to their finding an opportunity of purchasing lands, there would have been an end of the question. But Lord Stair has not done so.—(Their Lordships then quoted the clauses in the Scotch and English deeds.)

Thus the whole personal funds, by the English deed, were to be applied precisely in terms of the trust-deed of 18th December 1815, executed by the Earl in Scotland. And after all his debts and legacies were paid, and a sufficient sum was set apart for payment of the annuities provided by him, Lord Stair appointed his trustees to lay out the residue of the trust-funds, and interest and proceeds thereof, in purchasing lands in the three counties therein mentioned. But he, neither in the trust-deed 1815, nor in his last will, 5th January 1819, makes any provision for the accumulation of his funds, if his trustees should not invest them in land at the time directed by him; nor does he make any provision for this accumulation, if, by any unforeseen delays, the money should not be invested in land for many years.

The Earl of Stair died upon the 1st of June 1821, five years and a half ago; and it appears that a considerable sum still remains to be vested in lands. We conceive that the settlement contains no directions for the accumulation of the interest since the period that all his Lordship's debts and legacies were paid; and that the question comes to be, Whether this interest must be accumulated, and invested in the purchase of land, to be entailed in the same terms with his estate of Culquhassen? or, Whether the interest from that period does not belong to the pursuer, the present Earl of Stair, who, besides being the testator's heir of line and executor, is also the first heir of entail, and as such must have drawn the rents and the benefit of the estate acquired by these funds, if they had been invested in lands at the period appointed by the late Lord Stair? In short, Whether the pursuer is not entitled to claim the interest as a surrogatum for the rents which would at that period have accrued to him?

There is no doubt that the pursuer is the favoured person to whom

the trustees were bound to convey the estates, in terms of the entail. Many circumstances may occur, which, without the slightest blame being imputable to the trustees, might postpone the investment of these funds. They are limited to purchase lands in three counties, and they could not purchase them anywhere else. It might not have been possible for the trustees, therefore, to invest that capital in land at the period appointed. But even supposing that they could have purchased the lands, many reasons, derived perhaps from the high prices demanded, or from the well-founded expectations of acquiring lands at much lower prices, more contiguous, and better suited to the entailed estate of Culquhassen, may have rendered it wise in their estimation to refrain from purchasing; and there cannot be a doubt that these trustees might have most justly followed their own notions of prudence, and that no Court had any power to control them in the fair exercise of such discretion. Yet, could it be maintained, that £100,000, which would be the accumulation arising in ten years upon this fund, must have been applied in enlarging the estate to be bought for the posterior heirs of entail, and that the pursuer, the testator's first favoured heir of entail, his nearest relation, and the representative of his peerage and dignities, was thus to be deprived of this large sum, and of any benefit whatever arising from this fund during all that period?

It is quite possible that the trustees might wisely exercise their discretion during a period equal to the value of the present Lord Stair's life, and by this means they might deprive him, the favoured heir, of the great benefit which was devised to him as the first heir of entail, although he had even for many years survived the period when these funds were ordered to be invested in lands. Indeed, he has already survived that period nearly five years.

This question does not depend upon the trustees being guilty of improper delay. Whether the delay arose from absolute necessity, from the wise exercise of their discretion, or even from culpability on the part of the trustees, the effect is precisely the same to the favoured heir. From whatever cause it arose, the favoured heir cannot be deprived of the benefit intended for him by his ancestor; and certainly the general question comes to be considered in a far more favourable shape for the trustees than that in which it would have occurred, if culpable delay had been alleged against them. The Court must have then entered into a minute investigation of all the circumstances; and if there was culpable delay, the trustees might have been punished by paying the loss out of their own pockets. But this question does not depend upon any culpability whatever on the part of the trustees; for, however innocent and unavoidable the cause may have been, the pursuer, as the next heir of entail, has been deprived of those rents which he would otherwise have drawn, if the funds had been invested at the period appointed. Indeed, if he be not from that period allowed the interest of the funds as a surro-

gatum for the rents, the posterior heirs of entail will draw a benefit from the interest of part of the fund having been accumulated for many years after the entailer had appointed his trustees to invest this fund in land, to be entailed as directed by him.

It seems to be perfectly clear, therefore, that the rules of equity must in such a case interfere, and that no Court, where justice or equity is administered, can permit the benefit provided to one heir, on account of the will not being executed at the time appointed, to be transferred to another set of heirs, who had merely a postponed interest to the heir first preferred.

In England, where there exists a separate Court of Equity, the rules for carrying the intentions of the testator into effect may be more precisely defined than in this country, where equity and common law are administered in the same Court. It is impossible, however, to doubt that the same great principles of justice and of equity must regulate the decision of the Courts in both countries. We consider this to be a Scotch question, since it occurs with regard to a deed ordering lands to be purchased in Scotland. But where the will of the testator, from any cause over which he had no control, has not been carried into execution at the time appointed, justice requires that it should receive the same effect as if it had been executed at the time appointed, so as to secure to the favoured heir the benefit that he would have drawn from it, and to exclude the other heirs from the benefit which they can only claim from the settlement not having been executed at the period appointed. This Court has repeatedly acted on such principles.

Thus, during this very session, in the case of Dick against Gillies, 30th November 1826, where the testator had appointed his trustees, after his death, to sell his heritable subjects, consisting of certain shops in Glasgow, without specifying any precise period for the sale, which seems to have been left to the discretion of his trustees, the Second Division of the Court, in a question which occurred with regard to the succession of his representatives, were unanimously of opinion that the shops must be held as sold, and as moveable property, although not actually sold by his trustees at the death of one of his representatives. In short, the Court in that case were of opinion that every thing must be held as done which the testator has ordered to be done, and that the respective interests of his heirs and their representatives must be regulated accordingly.

The tempus a quo the funds are ordered in this case to be invested in the purchase of lands, is upon payment of the debts and legacies. It is not denied that the debts were paid soon after the Earl's death, and that sums were set apart for payment of the annuities. For payment of several of the legacies no time is mentioned; therefore, by the law of Scotland, debts and legacies might have been exigible six months after Lord Stair's death; but by the law of England, where Lord Stair resided and died, and where the will was executed in the

English form, legacies, for the payment of which no time is fixed, are not exigible until twelve months after the death; so that the legacies bequeathed by the English will were not payable until twelve months after Lord Stair's death, except one of them, which was declared to be payable at six months. In this way, we conceive that the tempus a quo the trustees were to lay out the residue of the trust-funds, and interest and proceeds thereof, was at the period of twelve months after Lord Stair's death. There is no after period at which the trustees are directed by the deeds to lay out the residue of the trust-funds, and interest and proceeds thereof, in purchasing lands, and there is not a single word, either in the trust-deed or in the English will, which can by any construction import an appointment to accumulate the interest and proceeds after that period:— Therefore, without being at all influenced by the general rule laid down in the Court of Chancery in England, of which we shall afterwards speak, the period at which the trustees must apply the trust-funds, interest and proceeds thereof, to the purchase of lands, is twelve months after the death of the testator, that being the time at which the executors were bound to pay the legacies, and at which period they were all paid. Although Lord Stair did not expressly say, that twelve months after his death they were to apply the trust-funds, interest and proceeds, in the purchase of lands, the terms he has made use of are equivalent in meaning, and entirely of the same import. He appoints the residue of his funds, interest and proceeds thereof, to be invested in lands, after the payment of his debts and legacies; and as this period did not, and legally could not, arrive until twelve months after his death, this must be held as the period a quo that investment was to be made, in the same manner as if he had actually fixed that period totidem verbis to be twelve months after his death.

Suppose that Lord Stair had fixed two years after his death as the period for applying the residue of his funds, interest and proceeds, in the investment of lands, is it possible that, without any stronger authority than the present deeds, the trustees could defeat the benefit intended for the favoured heir, and accumulate the sum for years beyond that period for the benefit of the future heirs? If, from any cause whatever, they were not able to purchase the estates, and put the favoured heir in possession of the rents, they must at least account to him for the interest of the sums they were appointed to invest in land, as the only surrogatum for the rents, of which he would have been in possession had the funds been invested in lands at the time appointed; yet we can make no distinction betwixt such a case and the one which has actually occurred.

With regard to the English cases, so much founded on by the parties, we conceive that these are not authorities sufficient to warrant the proceedings of this Court, which must be directed by their own laws and their own rules. But, in the absence of almost all

precedent in the discussion of this general question, we may refer to the English authorities, merely as lights to guide us when we have little of our own. The reasoning of able and intelligent Judges in another country, upon cases similar to those under discussion in this Court, has always received its due consideration. In this view, the English authorities are entitled to great weight in this question; and we certainly feel more confident in the opinion we have formed, as it seems so completely supported by the most enlightened Judges in dispensing those great principles of justice and equity in the Court of Chancery, which cannot be confined to that Court, but must apply to every Court entitled to exercise equitable powers; and it cannot be denied that this Court has in that respect the same powers in this country that the Court of Chancery has in England.

If we are right in these observations, as to the tempus a quo the trustees were appointed to invest the money, the decision of this question would not depend upon the general rule adopted in England, as to allowing interest to the heir upon such funds as were appointed to be invested in lands one year after the death of the testator, instead of allowing the interest to be accumulated; although, if that rule be not directly contrary to our own rules and precedents, we think there is so much expediency in it, that it ought to be adopted. It would save an immense deal of expense, delay, and litigation in every case; because, unless some general rule be adopted, every case of this nature must become the subject of minute and intricate investigation, in order that the Court may determine, in each special case, the time when the funds might have been invested in lands, and, of course, the tempus a quo the heir would be entitled to draw interest. This would be exposing trustees to such a troublesome, dangerous, and intricate discussion, with regard to the discretion which they had exercised, that no human being could ever be prevailed upon to execute so dangerous and troublesome an office, especially as the consequence of the Court finding that there was any culpable delay seems almost necessarily to be, that they must subject the trustees personally to the loss which either the one party or the other had sustained from that delay.

Now, it appears to us that this Court, upon the supposition of expediency alone, have gone further in establishing rules for their own practice, in such matters, than even the rule which seems to be adopted in the Court of Chancery in England. This Court corrected the old practice of allowing executors to pay to the creditor primo venienti, and have absolutely debarred them from paying until six months after the debtor's death. Erskine, iii. 9. 45. This is expressly enforced by an act of sederunt, 28th February 1662.

But further, with the view of saving litigation and investigation, with regard to every fund under judicial management, and with regard to the period when persons acting under judicial authority are bound to stock out the money under their management, this Court

has declared that every such person uplifting rents or annual rents, or which, by diligence, he might have recovered, is liable for the same, and for the interest thereof, from the period of one year after the rents or annual rents which he should have uplifted became due; and this is enforced by two acts of sederunt, 31st July 1690, and 13th February 1730, § 1.

We conceive, therefore, that this Court has the power to adopt such a general rule, in this case also, as has been acted on in the Court of Chancery in England, and that it would be a most beneficial exercise of a principle already applied to more difficult cases.

No inference can be drawn from the former decision of this case in the Outer-House, as confirmed by the First Division, and by the House of Lords; because that decision was pronounced within five months after the death of Lord Stair, and the interest was demanded from the time of his death. But Lord Stair had not appointed his trustees to invest the residue of his funds, and the interest and proceeds thereof, at the period of his death, but after the payment of his debts and legacies.

Lord Cringletie delivered this opinion:—The late Earl of Stair, on the 18th December 1815, executed a settlement, whereby he disponed to his trustees therein named, and the acceptors and survivors, or survivor of them, 'all and sundry,' &c.—(His Lordship then quoted the clauses founded on.)

No term of payment is mentioned in Lord Stair's settlement for payment of his legacies; but as they were to be paid partly out of funds situated in England, and to be collected by an executor resident there, the soonest that they could be paid would be after the lapse of a year, that being the time allowed by the English law to the executor to collect the funds, and inform himself of the debts due by the deceased.

In this situation, Lord Stair ordered his debts, legacies, and annuities to be paid, and a fund secured for the last; and, 'after my 'debts and legacies are all paid, and a sum set apart for payment of 'the annuities, or the same are otherwise well secured, I appoint 'my said trustees, and their foresaids, to lay out the residue of the 'trust-funds, and interest and proceeds thereof, in purchasing lands,' &c.

From this it appears to me to be quite evident that Lord Stair had not in contemplation any accumulation of his funds, except by the interest due on them at his death, and after that, till the time his debts and legacies should be paid, which, as already mentioned, was at the end of one year after his death. These are the interest and proceeds to which he must have alluded. If he had any thing else in contemplation, he would not have ordered land to be bought till after his annuities ceased; but, on the contrary, he understood that a fund was to be set apart for them, or that they were to be otherwise secured, and the land to be acquired as soon as possible.

And indeed we have a practical proof that this was the opinion of the trustees themselves, as they purchased land to the value of £135,000 within six months after Lord Stair's death.

The present Earl claims the interest of the fund remaining unemployed from the end of the year after the death of his predecessor; and I cannot accede to the idea that he shall not be entitled to it, on any of the grounds pleaded by the trustees of the latter, viz. That the principal and interest of the late Earl's funds must be accumulated and laid out on the purchase of land, at whatever period that land may be acquired; or, 2d, That there has been no delay by the trustees in making purchases; or, 3dly, That such demand is in any way contrary to the principles of the law of Scotland.

It it be thought imperative that the capital with interest accumulating on it, till land be bought, shall absolutely be employed in the purchase, there is no time within which it can be fixed that the purchase shall be made. The lands in this case were to be purchased in Ayr, Wigton, or Kirkcudbright. It might have happened that lands could not be bought to the extent of £200,000 in these counties. The very title of the earldom may become extinct before such lands might be found, and none of its heirs derive benefit from what was intended to aggrandize them. The estate of Stair may be devised to heirs-male, and the present heir or his successor may have no son, and a number of daughters for whom he has to provide, and would be prevented by being deprived of the funds which he would have had if land had been purchased. But the defenders do not carry the matters so far: They admit, and the Court has agreed to this, that if delay can be shown on the part of the trustees, the heir must be entitled to redress. Now, this appears to me to be a material part of this argument. Lord Eldin has found that there was delay, and the Court have found that there was no delay, in acquiring land; but there are no facts established on which the one finding or the other can be supported. There is no statement of the funds, and the manner of their employment; none of the land that might have been bought at a reasonable price, and was not purchased; no reason was given by the trustees why the whole fund has not been employed for its destined purpose. It therefore to me appears impossible, hoc statu, to say whether there has been delay or not. Indeed the action is not laid on any such ground. The present Earl of Stair does not allege it. He proceeds on the principle, that his predecessor had no view of accumulating his funds after the payment of his debts and legacies, but intended lands to be acquired at the end of the year after his death; and, consequently, that as the present Earl would have been entitled to the rents if land had been then acquired, he ought to be entitled to draw the interest of the money. But admitting that delay shall be the rule, and further admitting the trustees to be guilty of delay, it seems quite undeniable, that the period when the delay commenced would require to be as-

certained; and from that period downwards, the Earl would either be entitled to damages from the trustees for their misconduct, or his Lordship would be entitled to the interest of the accumulated sum, on the principle that, from the moment the delay took place, the money should be held to have been applied to the purchase of land, although it was not so applied. There is no other alternative. Either the trustees must be held personally liable to indemnify out of their own funds the Earl, or the accumulated money must be held to have been laid out on land, and the interest of it given as a surrogatum for the rents. I am inclined to think that this latter view would be adopted by the Court; for it would be a strong measure to make trustees personally liable, even though they might be considered to have been too tardy, unless it were clearly established that such delay was not innocent on their part.

But this establishes the great and leading principle which I espouse, namely, that if a period can be pointed out, at which the money should be held to have been employed on the purchase of land, the person entitled to its rents is entitled to the interest. And it appears to be of the utmost importance to avoid investigations, whether there has been delay or not, if that be possible. I can imagine a case where it would not be possible; for instance, if a man were to leave a large sum of money to trustees, directing them to apply it to the acquisition of land, to be settled on his heirs, when they saw suitable purchases, and, in the mean time, directing them to accumulate the capital and interest. In such a case, it is obvious that there would be a discretionary power vested in the trustees to retain the capital and accumulate the interest; while, at the same time, it is equally obvious that they could not retain it for ever. The question then might occur, Whether delay had taken place? and I can hardly imagine a predicament more disagreeable and difficult to the Court, and all parties concerned. It would be necessary to send to a Jury an issue, Whether delay had taken place or not? in which there must be inquiries, Whether land had been in the market which the trustees could have bought? How the funds had been employed in the mean time? Whether they could have been recovered, and made tangible or not? Whether the land could have been bought at reasonable prices or not? and at what periods? All which embrace investigations of long, delicate, and disagreeable consequences, attended with litigation and expense, and involving the conduct and character of the trustees. If all this be absolutely necessary, there is no help for it; but if it can be avoided, it will surely be desirable, and I think that it can and ought to be avoided in every case where it can be discovered, or it can be presumed, that the will of the testator is that his money shall be employed at a particular period, and by adopting the rule of law, to hold the money as employed at that period, although it truly happens to be still in the bank. By assuming this principle, the trustees will indemnify the heir, by paying

him the interest as a surrogatum for the rents of lands. Nothing will be demandable from their private funds. They need not be importuned either by the first heir or his successors to purchase land. They will be left to their discretion in collecting the trust-funds, some of which may be lost by precipitate demands; some locked up in sales of bankrupt estates, and many other embarrassments. They will not be led to make inconsiderate purchases of land at times when prices may be high, or to give high prices because sellers know that the trustees are obliged to buy land. Every disagreeable investigation will in all probability be avoided. Trustees will not be called to defend themselves by entering into details of their conduct, and showing that they have behaved with honour and integrity in the true spirit of the trust committed to them. They will feel themselves at much greater freedom to act than if it be decided that they may hold both principal and interest of the fund destined to the acquisition of land, till such time as they think proper to employ the money in that way; and they will preserve the ties of friendship of the persons for whom they act, instead of becoming the objects of suspicion, jealousy, and ill-will.

I am therefore humbly of opinion that it is highly expedient to adopt the rule, that when it appears from a sound construction of any man's trust, that he intends his fund destined for the acquirement of land to be employed in that way at a certain period, and the rents to be given to his heir, this Court, as a Court of Equity, should hold the money as employed at that period, though not so, and award to the heir the interest of the unemployed fund becoming due after that period, as a surrogatum for the rents. And I think it peculiarly fortunate that the House of Lords should have recommended to us to consider how far that system, so manifestly expedient, and repressive of litigation, is consistent with Scotch law; and on this point I think that there is not only nothing to prevent it, but that it is agreeable to the practice of the Court in other cases.

In the first place, it is admitted that this is the first case in which that doctrine has been pleaded, or any heir has called on trustees to account, on the principle contended for in this action, for the interest of unemployed trust-funds appropriated to the purchase of land. There is therefore no precedent against it to struggle with; and it is surely no reason for not acting, that it is the first time the Court has been called on to act. The cases of Reid *v.* Coates, 10th March 1809, and one therein referred to, Speed *v.* Speed, have been quoted as in opposition to this doctrine. But they appear to me no way hostile, and, on the contrary, are in favour of the principle which I would introduce. These decisions proceed on the principle that the will of the testator is to be executed wherever it can be discovered what it is; and, accordingly, the Court resisted the demand of the pursuer in both of these cases, because they thought it not consistent with the nature of the trust. I am decidedly of opinion that the

will of the truster must be executed; but the question is, What was that will?

2dly, To regulate the application of trust-money, and the conduct of trustees, is in perfect consistency with what the Court have done on other occasions. We all know that an executor of a will has been always, and is still considered, merely as a trustee for behoof of all concerned. We also know that, by our old law, an executor was entitled to pay to the first creditor who obtained a decree against him for payment of the defunct's debt, though such decree might be within a month of his death, thereby preferring those who were apprised of the debtor's death, and lived near the Courts of Justice, to those who, living at a distance, were ignorant of the debtor's death, and could not obtain a decree against his executor; further, that an executor was entitled to retain the defunct's funds in payment of any debt due to himself by the defunct; and many other practices were competent which were censurable;—all of which defects were corrected by this Court by the Act of Sederunt, 28th February 1662, which enacted, That no executor should pay any creditor of the deceased sooner than the end of six months from his death, and that he could not retain the funds in payment of any debt due to himself by the deceased, in preference to such creditors as shall have cited him within the six months in an action for payment of their debts, &c. Similar regulations have been adopted for the government of tutors, curators, and factors. Since, then, the Court introduced rules for regulating the conduct of legal trustees, why shall it not adopt one for the government of voluntary trustees, when every consideration of expediency and equity requires them to embrace such a measure?

I am therefore humbly of opinion, 1st, That wherever this Court can ascertain the period at which a person in his settlement has appointed his funds after his death to be employed in purchasing land for the benefit of his heir, it ought to hold the money, though not employed at that period, as laid out, and from that date allow the heir to draw the interest of the capital, ay and until it be expended in the acquisition of land.

2d, From the settlements of the late Earl of Stair, it is evident that his Lordship wished, that after payment of his debts and legacies, and provisions made for that of his annuities, his funds, principal and interest, then accruing, included, should be employed in the purchase of land, to be entailed on his heir, the present Earl; that the legal period for paying his debts and legacies is one year after his death, at which period, too, his Lordship contemplated provision being made for paying his annuities; and consequently his wish was, that at the end of a year after his death, land, if possible, ought to be purchased. If he had ordered the residue, and interest and proceeds of his funds, to be laid out on land at the end of two years after his death, then I think it indisputable that he did not intend accumulation of inter-

est, with capital, after the end of two years; and as he ordered it to be sooner laid out, the same conclusion follows.

And, 3d, That the present Earl ought to be found entitled to draw the interest, from a year after his predecessor's death, of all his funds applicable to the purchase of land, until the money either was or shall be hereafter so employed; and on these principles the trustees ought to be ordered to give in a statement of accounts, showing what is due to the present Earl.

Lords President, Craigie, and Balgray merely stated that they adhered to their former opinions, concurring with the majority.

Lord Gillies stated that he had altered his opinion, and now agreed with the minority, being satisfied that the words of the deed applied only to the prior interest, and not to the future.*

Pursuer's Authorities.—Campbell, June 6. 1752, (7040 and 14703); Ramsay, Jan. 1738, (Elchies's Session Papers, Adv. Lib. Vol. 12. p. 160); K. Coll. of Aberdeen, Feb. 23. 1741, (Elchies, No. 11. Trust); Glenfarquhar, Nov. 1722, (Elchies's Session Papers. Vol. 12. p. 13); 1. Kames, Eq. p. 1. c. 3. § 2; Hutcheson, July 12. 1791, (1. Vesey jun. 366); Hollingsworth, 6. Vesey jun. 520; Pothier, Pand. Lib. 33. p. 1. t. 1. p. 2. § 1. Art. 4; Sitwell, July 27. and Dec. 5. 1801, (6. Vesey jun. 520.)

M'Kenzie and Innes, W. S.—J. and A. Smith, W. S.—Agents.

Forbes' Trustees, Pursuers.—*Jeffrey—Tait.*
W. A. Welsh, Defender.—*D. of F. Moncreiff—Robertson.*

No. 249.

Tenor, Proving of.—Circumstances in which the Court decerned in a proving of the tenor of a written cautionary obligation, although there was no proof of any special casus amissionis.

March 1. 1827.

2d Division. F.

In November 1815, an action of count and reckoning was instituted by Forbes of Culloden, and Mr. Tait, writer to the signet, his trustee, against Dr. John Forbes, who had been appointed by them factor on the estates of Culloden in 1810, concluding against him for payment of a certain balance said to be due by him, and containing likewise a conclusion to the same effect against Welsh, the father of the present defender, under a letter and obligation alleged to have been granted by him to Mr. Tait, the trustee, of date 7th July 1810, binding himself as cautioner for Dr. Forbes to the extent of £1000; but this letter was not recited in the summons. Defences were given in by Dr. Forbes only; and after some procedure, and the action having been transferred against the present defender on the death of his

* For these opinions see Wilson and Shaw's Appeal Cases, 26th May 1826, p. 418.

father, decree was pronounced against both parties for a sum of £1975, the balance reported by an accountant to be due by Dr. Forbes.

Welsh then gave in a representation, accompanied with defences, stating that the letter of obligation by his father had not been produced, but, at the same time, reciting verbatim a letter as being the one founded on. The pursuer not having been able to produce this letter, a summons was raised by Russel and others, who were now Culloden's trustees, to have its tenor proved. In this summons the casus amissionis was stated in the following terms:—'The letter and obligation aforesaid, granted by the said 'deceased William Welsh, was mislaid or lost by the said Craw-'furd Tait in the multiplicity of business under his charge; 'and owing to the great intricacy and confusion arising from the 'great number of documents connected with and produced in 'the said process, and other relative proceedings, the said letter 'and obligation cannot now be found.'

The Court, having sustained the adminicles, allowed a proof, from which it appeared that a letter of obligation in the terms sought to be proved, and the same with that recited in the defences, was inserted in the minute-book of the Culloden trust;—that, from entries in a ledger of writings in Mr. Tait's office, it must have been so inserted previous to 1812;—that another copy, in precisely the same terms, was entered in his father's letter-book by the defender himself, who deponed that he so entered it in February 1815 from a scroll in the handwriting of different persons, part of it being in his father's handwriting, but without date or signature, although, under the entry in the letter-book, there was marked the date in pencil, 'Inverness, '7th July 1810.' It was also deponed to by Dr. Forbes, the defender in the action of count and reckoning, that after he had been factor for some time, he offered to procure a letter of security for his intromissions to a certain extent from the late Mr. Welsh, who was his father-in-law;—that, in the month of June 1810, he found upon his table a letter signed by William Welsh, and addressed to Mr. Tait, which he delivered to Mr. Young, partner of Mr. Tait, within three hours after he found it;—that he was acquainted with Mr. Welsh's handwriting, and looked at the letter only cursorily, but that it did not strike him that it was written by any other person than Mr. Welsh;—that the substance of the letter was, that the writer of it bound himself as his security to the extent of £1000, on condition that there should be a settlement of accounts every twelve months: and being shown a copy of the letter as entered in the trust minute-book,

he deponed that it was agreeable to his recollection of the letter which he found on his table; and he further deponed, that he afterwards had a conversation with Mr. Welsh about an obligation of cautionry by the latter for him as factor to Culloden, in which conversation 'Mr. Welsh spoke of himself as bound in 'such obligation.' In addition to this evidence, Mr. Newton (who had been an apprentice with Mr. Tait for five years from October 1812) was examined, and deponed that the impression on his mind was, that he had seen among the Culloden papers a letter to the purport of that sought to be proved.

No proof was led as to the casus amissionis; and decree of circumduction having been pronounced, a state was made up, and the cause enrolled, when it was objected on the part of the defender, That there was no special casus amissionis either averred or proved, which, it was contended, was essential in a proving of the tenor of any document of the nature of the present, where the obligation constituted by it was capable of being discharged by the mere cancellation or delivering up of the document.

To this it was answered, That the necessity of proving a special casus depended on the whole facts and circumstances of the case, whether there was any thing in the conduct of the parties tending to show that the document might have been cancelled and not lost, and that in the present case the whole conduct of parties evidently proceeded on a constant belief of the subsistence of the obligation.

The Court, thinking that it would be satisfactory to have evidence led of the circumstances, as set forth in the summons, relative to the loss of the document, allowed the pursuers to give in a petition praying to have the circumduction opened up, in order to examine Mr. Tait and Mr. Young; but this having been opposed by the defender, their Lordships found that it was unnecessary to decide whether the circumduction might be opened up, and decerned in the proving.

Lord Justice-Clerk.—This is a very important and delicate matter, in regard to which it is necessary to look very closely into the authorities; but I do think that there are passages in our institutional writers, sufficient to warrant our decerning in this proving. Erskine (4. 1. 54.) says, that 'in deeds which are intended to remain con-'stantly with the grantee, or which require contrary deeds of re-'nunciation to extinguish them, as dispositions, sasines, &c., or where 'the debtor who makes payment does not commonly choose to rely 'for their extinction on the bare cancelling of them, as assignations, '&c., a more general casus amissionis is sufficient; insomuch that

'most lawyers are of opinion that it is sufficient to libel that the 'deed was lost anyhow, even casu fortuito.' Bankton (4. 49.) goes still further, and Stair (4. 32. 6. 7.) observes, 'But where there are 'adminicles relating to the tenor produced, the casus amissionis will 'be sufficiently libelled that the writ was lost; but, without these, 'some proof must be of the casus amissionis, as if the Lords require 'the pursuer to depone that the writ was lost.'—'So, then, in pro-'bation of tenors, there must still be libelled a casus amissionis. 'But if that be specially proven, there need no adminicles; and if 'there be adminicles as to the ordinar articles, there needs no further 'probation than what has been said of the casus amissionis. But 'the oath of a party is sufficient without both.' Now, in the present case, there is a very peculiar circumstance, though the casus be loosely libelled; for in 1815 an action was raised against Dr. Forbes and Welsh, founding on this letter. It is proved to have been inserted in the sederunt-book of the trustees prior to November 1812, and it is likewise inserted in a letter-book by the defender himself in the very terms sought to be proved. This makes it the strongest proof I ever saw in cases of this kind; and the insertion of it by the defender goes further than the mere proof of the tenor, as it shows his wish to preserve it as a guide to himself as a binding deed. The action then goes before an accountant, and after the balance due by Dr. Forbes is ascertained, Welsh gives in defences, reciting the very words of this letter, without an insinuation that it had been done away, restored, or cancelled. This is real evidence that, down to this period, there was no notion of its having been given up. Then we have Dr. Forbes' evidence, from which I think there can be no doubt that the letter was holograph of his father-in-law, who sent it as the security for his intromissions; and we have also the deposition of Mr. Newton, that he thinks he saw a letter, of the description sought to be proved, among the Culloden papers, which altogether brings forward that sort of evidence contemplated by Stair and Bankton, as rendering it unnecessary to prove any special casus. Further, I do not think that it is the usual mode of extinguishing obligations of this kind, merely to deliver up or cancel the document. No one would advise any thing but an express discharge, especially when such near relations are concerned; and on the whole, although I should have wished that Mr. Young had been examined, I am prepared, in the peculiar circumstances, to decern in the proving.

LORD PITMILLY.—I concur in the opinion delivered. I have looked into all the authorities quoted, and I have certainly got more light from Lord Stair than from the Decisions. It is clear that when the deed is of a nature usually discharged by cancelling, as a bill, a special casus must be proved, though otherwise it may not be required. This is the general rule; but there is a more general rule still, which is this, that the whole circumstances must be looked into, to see whether or not there are sufficient grounds for holding that the deed

has never been given up, and just for the reasons given by Erskine, when he says, 'otherwise bonds truly paid might be again demanded 'from the debtor, as obligations still subsisting.' This is the only reason for requiring a proof of the casus, and it leads us to inquire whether, on the whole, the circumstances warrant us to hold that the deed has been lost. I will not go over the whole circumstances; but I am chiefly moved by that of an action founding on the letter having been raised in 1815, and defences given in reciting the letter, and not insinuating that it had been cancelled or delivered. There are other circumstances of a peculiar nature; and though I should wish, if consistent with form, still to have Mr. Young examined, at least as a haver, I am satisfied that, even as the case stands, there are sufficient grounds for decerning in favour of the pursuer.

Lord Alloway.—I have come to the same conclusion. I also should have liked to have had Mr. Young and Mr. Tait examined; but, even without that, I have no doubt, on the whole, that we are warranted to decern in the proving. It is not necessary to go over the principles so well laid down by your Lordships, which all lead to this —Is there a case made out, in the whole circumstances, to show that the deed cannot have been delivered up? For if a case can be shown where it may have been delivered up, I would require a proof of a special casus. But the conduct of the parties here proves it is impossible that the deed could have been given up. The original action, in which the late Mr. Welsh was called, was raised in 1815 when he was alive, and he survived a year, yet no defence was lodged stating the deed to be cancelled; then, when the extent of Dr. Forbes' liability is settled, the present defender gives in defences stating the precise words of the letter, which is proved to have been inserted in the trustees' minute-book before 1812. It is likewise proved to have been delivered by Dr. Forbes to Mr. Young, Mr. Tait's partner;—it is seen by Mr. Newton in Mr. Tait's possession,—and what is very important, it is entered in Mr. Welsh's own book, just about six months before the action in 1815 was raised. In these circumstances, it is impossible to believe that it was cancelled or delivered up, and there is not an allegation to that effect. We know very well that small papers often go astray amidst the confusion of processes, and it is only the other day that an important document in regard to the case of the D. of Gordon *v.* Innes was accidentally discovered, after having been missing for many years. Though the decisions quoted have had different results, they all proceed on the same principle of founding on the general circumstances of the case, which, in the present instance, can leave no possible doubt that the document sought to be proved has not been delivered up nor cancelled.

Pursuers' Authorities.—4. Ersk. I. 54; 4. Bank. 49; 4. Stair, 32. 6. 7; Cheyne, March 1682, (15803); Mein, Jan. 21. 1663, (15789); Moffat, Jan. 31. 1809, (*F. C.*)

Defender's Authorities.—4. Ersk. 1. 54; Kircaldy, July 21. 1687, (15786); Campbell, Feb. 22. 1780, (15828); Marq. of Annandale, May 28. 1733, (1. Craigie and Stewart's Appeals, 108.)

TAITS and YOUNG, W. S.—Æ. MACBEAN, W. S.—Agents.

No. 250.

D. GILCHRIST, Suspender.—*Matheson.*
J. M'GREGOR, Charger.—*Jameson.*

March 1. 1827.
2D DIVISION.
Bill-Chamber.
M'K.

Process—Previous Expenses.—THE Sheriff of Sutherland having pronounced decree for certain previous expenses, a bill of suspension was presented, which the Lord Ordinary refused; but the Court, on consideration of the whole circumstances, remitted to the Sheriff to proceed in the cause, reserving all questions of expenses.

INGLIS and WEIR, W. S.—J. MACDONELL, W. S.—Agents.

No. 251.

W. YOUNG, Pursuer.—*Fullerton.*
J. ROBERTSON, Defender.—*Skene—Marshall.*

Agent and Client—Sequestration.—In an action by a law agent under a sequestration against a creditor for payment of his account—Held not a sufficient defence that instructions had been given by the creditors to the trustee, and inserted in the sederunt-book by the agent, to raise an action for a debt, and obtain a vendition of the share of a ship, which not having been done, the debt and price of the share had been lost—there being no evidence that he had received instructions from the trustee to take such steps.

March 1. 1827.
2D DIVISION.
Ld. Cringletie.
F.

THIS was an action at the instance of Young, a writer in Kilmarnock, against Robertson, one of the creditors on the sequestrated estate of M'Master, on which Smith, a farmer, was trustee, for payment of his business accounts, incurred as law agent in the sequestration. The defences were,

1. That Young had agreed to charge according to the rates adopted by the writers in Kilwinning, but that he had made out his accounts according to the Kilmarnock rates, which were considerably higher.

2. That he had neglected to sue for a debt due to the estate till prescription had run, notwithstanding there had been entries in the sederunt-book, in his own handwriting, directing steps to be taken for recovery of the debt, and notwithstanding alleged instructions from the trustee to that effect; and,

3. That he had in like manner, and under similar circumstances, neglected to obtain a vendition made out of a share of a vessel belonging to the bankrupt, whereby, on the shipwreck of the vessel, the price had been lost to the estate.

In answer, the pursuer denied the allegation as to the agree-

ment regarding the rate of charges; and as to the other two points, he contended that the entries in the sederunt-book, being directions by the creditors or commissioners to the trustee, the pursuer was not bound, in consequence of them, to take any steps without instructions from the trustee to that effect, which he denied to have received, and that the creditors had recourse on the trustee, against whom they had reserved their right of action in auditing his states.

The Lord Ordinary found that there was no evidence of the defender's allegations; and as none were offered other than the pursuer's oath, he appointed the defender to state whether he meant to make a reference to oath or not.

Against this interlocutor the defender reclaimed, and contended that, in the circumstances of the case, the trustee being a country man, necessarily unacquainted with business, the entries in the sederunt-book by the pursuer himself were sufficient instructions for taking the steps which he had neglected; but the Court adhered.

A. H. MANNERS, W. S.—Agent.

F. HEDDLE, Advocator.—*Gordon.*
C. GARIOCH, Respondent.—*R. Riddell.*

No. 252.

Sheriff-Clerk — Statute 6. Geo. IV. c. 23. — Sheriff-Clerks not precluded by the above statute from appointing deputies in circumstances where that is necessary for conducting the business.

March 1. 1827.

2D DIVISION. Lord Medwyn. B.

BY the 6th Geo. IV. c. 23, 'for the better regulation of the 'Sheriff Courts in Scotland,' it is enacted, 'That any person who 'has been appointed since the first day of August 1814, or 'who shall be hereafter appointed, a Clerk in the said Sheriff or 'Steward Courts, shall discharge the duties of the office personally.'

The advocator Heddle held the office of Sheriff-Clerk of Shetland under a commission dated in 1815, and containing a power 'to appoint deputies in the said office, for whom he shall be answerable, and to alter and change them at his pleasure.' Heddle was also proprietor of some land in Shetland; and having occasion to sue Garioch, one of his tenants, for payment of rent, amounting to about £8, he raised a summons in the Sheriff Court of Shetland, which was signed by Nicol, a person who had for several years held from him a commission as Depute Sheriff-Clerk.

To this summons it was pleaded in defence,

1. That, since the passing of the above-mentioned statute, no

person was capable of acting, except the Sheriff-Clerk himself; or, at all events, if there was an absolute necessity for another person acting, he ought to be appointed by the Sheriff, and not by the Sheriff-Clerk; and,

2. That it was illegal, under the Act of Sederunt 6th March 1788, and as decided in the case of Campbell *v.* M'Cowan, for a clerk of Court to bring an action of his own before the Court in which he must necessarily officiate as clerk. The Sheriffs Depute and Substitute found, 'that the summons in the present case is 'subscribed by a person not now qualified to act as clerk of Court,' and therefore dismissed the action. Heddle then brought an advocation, on the ground,

1. That the object of the 6th Geo. IV. was not to exclude the acting by deputy where that was necessary, but merely to prevent the abuses which had arisen from the Sheriff-Clerks making a sinecure of the office, and that in the present instance it was absolutely necessary to have recourse to a depute, as must also be the case in extensive counties, or in the event of sickness; and,

2. That the action here being against a tenant within the sheriffdom, and for a sum which, from its amount, could neither be sued for in the Small Debt Court, nor before the Court of Session, it was impossible to bring it before any other Court, and that all objection to its proceeding in the Sheriff Court was obviated by the depute acting as clerk.

The Lord Ordinary having reported the cause, the Court unanimously instructed his Lordship to remit to the Sheriff to recall his interlocutor, and proceed in the cause.

Lord Glenlee.—All that is said in the statute is, that the Sheriff-Clerk shall do his duty. I cannot go so far, however, as to admit an argument used at the Bar, that because there is no penalty provided by the act, it cannot be enforced. If a petition and complaint for disregarding the act be properly brought before this Court, we certainly will find means of enforcing it. All that is intended by the act is, that the Sheriff-Clerk shall not make a sinecure of his office, and must bonâ fide do his duty; but it was surely never intended to disable him from appointing a deputy when absolutely necessary, as in cases of sickness, great extent of county, &c. It would be quite erroneous to find a depute disqualified to do that duty which the principal cannot do, and there is no case in which he is more called on to name a deputy than where he himself is party in a cause. It is said that the Act of Sederunt March 6. 1783 precludes the Sheriff-Clerk from bringing an action in his own Court; but that Act of Sederunt relates solely to clerks being *agents* in their own Courts.

Lord Pitmilly.—I am entirely of the same opinion. The meaning

of the statute is, that Sheriff-Clerks shall bonâ fide discharge in person the duties of their office, but not that they shall be precluded from appointing deputies, where a necessity for doing so exists; and accordingly the commissions granted since the passing of the act contain as formerly a power to appoint deputies. The admission by the respondent, that the Sheriff might appoint a person to act as deputy, destroys his own argument, since his interpretation of the statute would prevent that also.

LORD ALLOWAY.—I have no doubt on the subject.

LORD JUSTICE-CLERK.—I also concur; but I likewise agree with what fell from Lord Glenlee, that the act is not nugatory; and that if a Sheriff-Clerk appointed since August 1814 should attempt to make a sinecure of the office, he will find himself in a very difficult situation.

Respondent's Authorities.—Act of Sederunt, March 6. 1783; Campbell, July 10. 1824, (ante, Vol. III. No. 187.)

J. R. SKINNER, W. S.—G. MUNRO,—Agents.

J. M'BAIN and H. ARBUCKLE, Complainers.—*D. of F. Moncreiff—Ivory—Wilson.*
C. INNES, C. THOMSON, and Others, Respondents.—*Sol.-Gen. Hope—Forsyth—Menzies.*

No. 253.

Burgh Royal—Process—Mandate.—A petition and complaint against the election of Magistrates having been presented in name of a party who was a native Scotsman, a resident burgess, and a constituent member of the meeting for election, but who at the date of the complaint was abroad, and no mandatory having concurred—Held,—1.—That it was incompetent at his instance;—and,—2.—That a party who had appeared and litigated the case as a respondent, could not sist himself as a complainer.

March 2. 1827.

1st DIVISION. Lord Medwyn. H.

ON the 29th of September 1825, an election of Magistrates and Council for the burgh of Queensferry took place, at which Arbuckle was chosen to act as proxy for one of the electors who was absent, and in which capacity he voted. Against the election which was made, he and M'Bain (who alleged that he was a constituent member of the meeting) presented a petition and complaint on the 25th of November thereafter. A few days, however, after the election, Arbuckle, who was a native of Scotland, and a resident burgess of Queensferry, went abroad in prosecution of his business, and when the complaint was presented he was either in France or in Holland. Against the competency of this complaint at his instance the respondents objected, That as he was abroad at the time when it was presented, and as neither any mandate had been granted by him, nor any mandatory had concurred, it must be dismissed; and as the period had expired within which a regular complaint could be received, it was not now competent to

sist a mandatory, nor was it a sufficient answer to say that Arbuckle had sanctioned the proceeding, and still adhered to it.

To this it was answered, That as Arbuckle was a native Scotsman and resident burgess of Queensferry, and a constituent member of the meeting, and as he had gone abroad merely in prosecution of his lawful business, and not animo remanendi,—and as it was proved by a letter written by him while abroad in September to Mr. Gibson-Craig, writer to the signet, that he was anxious that the complaint should be presented, the objection was not well founded.

The Court, however, on the 11th of March 1826, 'dismissed 'the petition and complaint, in so far as it is made by Hugh Ar-'buckle,' and found him liable in one half of the expenses; but appointed Cases in relation to certain objections stated against the title of M'Bain. Arbuckle then appealed, and the respondents having obtained from M'Bain a discharge of the process, they applied to the Court to dismiss it in toto; but their Lordships declined to write upon it, in consequence of the appeal. A few days afterwards M'Bain gave a letter to his agent, stating that the discharge had been impetrated from him, and that he still insisted in the complaint.

Thereafter the House of Lords, on the 22d February 1827, affirmed the judgment, and remitted the cause back to the Court of Session, to proceed in the complaint at the instance of M'Bain. When the judgment came to be applied, Thomson, who had hitherto appeared as a respondent, moved to be allowed to sist himself as a complainer, and appearance was also made for M'Bain.

The respondents then objected, That Thomson could not be allowed to change sides; and that as M'Bain had granted a formal discharge of the process, of which no reduction had been brought, he was bound by it, and no regard could be paid to his letter.

The Court, after applying the judgment of the House of Lords, refused the motion for Thomson; and as M'Bain had been ordered to attend a committee of the House of Commons, and had gone to London, they suspended the case as to him.

The Court were unanimously of opinion that the objection stated against the competency of the complaint at the instance of Arbuckle was well founded; but that they could not permit Thomson, who was not a neutral party, to sist himself as a complainer, after having all along opposed the complaint as a respondent.

Respondents' Authorities.—(1.)—Dundas, July 30. 1780, (8837); Davidson, July 6. 1802, (8842); Cameron, Feb. 28. 1818, (F. C.); Gray, Feb. 24. 1804, (No. 15. App. B. Royal.)—(2.)—Bell on El. p. 493; Campbell, June 24. 1804, (F. C.); Grant, Feb. 29. 1821, (F. C.)

D. Wilson, W. S.—Horne and Rose, W. S.—Agents.

C. GIRDWOOD and Co. Advocators.—*D. of F. Moncreiff—Pyper.* No. 254.
POLLOCK, GILMOUR, and Co. Respondents.—*Sol.-Gen. Hope—Henderson.*
J. WILSON and SON, Respondents.—*Monteith.*

Sale—Landlord's Hypothec.—Questions raised, but not decided,—1.—Whether delivery of part of a machine which a manufacturer was employed to make, and for which a bill was granted, transferred the property of the part;—and,—2.—Whether (supposing it did not) the landlord had a hypothec over it for his rent of the mill in which it was placed.

March 2. 1827.
1st DIVISION. Lord Eldin. S.

THIS was a special case, but in which two points of law were raised and argued:—1. Whether, when a manufacturer has been employed to make a spinning machine, and he has delivered part of it, and taken a bill for the price, the property of the part so delivered is to be held as transferred, and so liable to be attached by creditors;—and, 2. Supposing the property not to be transferred, Whether the landlord has a hypothec over the part delivered for payment of the rent. It appeared, however, from entries in the books of Girdwood and Company, the manufacturers, that they had regarded the property as transferred; but while they maintained that such was not the meaning of the entries, and that in point of law it had not been transferred, they alleged alternatively, that, by a subsequent transaction with the creditors of the bankrupt, it had been reconveyed to them. The Magistrates of Glasgow, before whom the case originally came, found evidence of the transfer of the property to the bankrupt, but none as to the subsequent reconveyance, and pronounced judgment accordingly; and in an advocation the Lord Ordinary remitted simpliciter; but the Court, being satisfied that the subsequent agreement had been proved, altered, found Girdwood and Company entitled to the property, and remitted to the Magistrates to hear further as to the claim of hypothec.

Advocators' Authority.—1. Bell, p. 106.
Respondents' Authorities.—(1.)—Stair, p. 131; 3. Ersk. 3. 2; 1. Bell, p. 89.—(2.)—2. Ersk. 6. 64; 1. Bank. 17. 10; 2. Pothier, p. 277; 2. Bell, p. 34.

MACMILLAN and GRANT, W. S.—A. PATERSON,—W. and A. G. ELLIS, W. S.—Agents.

No. 255.

BAIRD, Pursuer.—*Wilson.*
His CREDITORS, Defenders.—*Macfarlane.*

Cessio Bonorum.—A cessio refused to the father of a bastard child, who was incarcerated by the mother for payment of aliment.

March 2. 1827.
1ST DIVISION.

BAIRD, a day-labourer, having been incarcerated by the mother of a bastard child, of which he was the father, for payment of aliment, brought a process of cessio, in which he stated that he had no funds; that he was alimented in prison under the Act of Grace by the mother; that the only mode in which he could earn any thing was by his exertions as a labourer, and that he was willing to aliment the child out of his wages; but that he could not do so, unless he obtained the benefit of the process. To this it was objected by the mother, That it had been settled that where the father of a bastard child is incarcerated by the mother for aliment, he is not entitled to the benefit of the cessio. The Court, after entertaining considerable doubts as to the principle, refused the cessio.

Defenders' Authorities.—Ritchie, Dec. 20. 1811, (F. C.); M'Calman, Dec. 4. 1824, (ante, Vol. III. No. 291.)

W. MERCER, W. S.—TOD and WRIGHT, W. S.—Agents.

No. 256.

G. COTTON, Pursuer.—*Sol.-Gen. Hope—Houston.*
Mrs] MANUEL, Defender.—*D. of F. Moncreiff—Neaves.*

March 2. 1827.
1ST DIVISION.
Lord Eldin.
S.

THIS was a competition of titles for a small urban tenement, in which the Lord Ordinary assoilzied the defender in respect that the pursuer had shown no title to insist, and the Court adhered.

J. and W. DYMOCK, W. S.—W. SMITH,—Agents.

No. 257.

J. BLACK, Advocator.—*Skene—A. M'Neill.*
W. BROWN, Respondent.—*Jeffrey—Jameson.*

Process—Reparation—Slander.—1.—A party held liable in damages for defamatory statements made malâ fide, and not pertinent in the course of judicial proceedings.—2.—A sum of damages awarded in the Inferior Court modified in an advocation, though no special plea of excess on the record, but merely the general plea of none being due.

March 2. 1827.
2D DIVISION.
Ld. Cringletie.
M'K.

THE advocator Black, an old man 75 years of age, and his sister Mary Black, who lived together, executed a mutual trust-deed and settlement, whereby they each conveyed all their property, heritable and moveable, to the respondent Brown, a writer

in Glasgow, and certain other persons, as trustees for the liferent use of the survivor of the two, and for certain other purposes after the death of the longest liver. The sister died in March 1822, and, on the occasion of her funeral, Brown attended with some other persons to take an inventory of her effects. After making an inventory of the effects in her room, the persons present were proceeding to the room of Black, when he interfered to prevent them; but after a scuffle, in which Black was thrown down, and had three of his ribs broken, they entered his room also, with the view of inventorying any articles there which might have been the property of the sister. An inventory was accordingly made out of certain sums of money, bills, and title-deeds found in the sister's repositories, and articles of furniture, &c. said to belong to her. Brown and the others carried away the money, title-deeds, and bills, without leaving a copy of the inventory with Black; and two days afterwards they presented a petition to the Magistrates of Glasgow, setting forth that they were also entitled to take possession of the furniture, &c. contained in the inventory, which had been the property of the sister, and praying for a warrant to do so.

In answer to this petition, Black contended that he was entitled to the liferent use of those articles which had belonged to his sister, and he alleged that several of the articles in the inventory belonged exclusively to himself. After some procedure, the Magistrates found his property in these particular articles established, but at the same time found that he was not entitled to the liferent use of the ipsa corpora of the articles of furniture belonging to his sister, but merely to the free yearly rent thereof, or of the proceeds; and in this judgment both parties acquiesced. About two years afterwards, however, Black presented a petition to the Magistrates, setting forth the circumstance of his sister's death, and that, 'immediately after her interment, the said William 'Brown, aided and assisted by the said John M'Cubbin,' (another of the trustees,) 'proceeded to take an inventory of the deceased's 'effects, along with all and sundry the title-deeds, vouchers, 'and other valuable papers, &c. said to be her property, which 'they took away, without leaving with the petitioner a copy of 'the inventory so taken, he being the defunct's only brother, and 'nearest of kin to her: That the whole, at least the greater part 'of the said title-deeds, vouchers, and other valuable papers, were 'the exclusive property of the petitioner, and not of his deceased 'sister:'—'That, independent of the papers above mentioned, 'there was at the same time carried away, either by the said 'William Brown or John M'Cubbin, a considerable sum of

'money, which has not been accounted for to the petitioner, and 'to which he has right;' and praying the Magistrates to find that Brown and M'Cubbin 'have acted unwarrantably in taking 'away the title-deeds, vouchers, and other valuable papers and 'money belonging to the petitioner, without leaving an inventory 'thereof with him, and to ordain the said William Brown and 'John M'Cubbin to deliver up to the petitioner the whole papers, 'money, &c. taken away by them, with inventories thereof.'

In the procedure following on this petition, Brown (coupling his statements with some abuse of Black as having been drunk &c.) denied that he had taken away any thing which was not the property of the sister, and observed in one of his papers, that 'if the pursuer shall be so advised as to litigate this hopeless case 'any more,' it would be necessary that he 'should be ordained 'to state in a condescendence the titles, effects, and money be-'longing to him, which he alleges to have been carried off; and 'the respondent will then have an opportunity of knowing the 'particulars of the demand now made upon him, and be able to 'consider of the means he ought to adopt to obtain redress for 'the injury which the pursuer is attempting to inflict upon him.'

In consequence of this, the Magistrates ordered a condescendence, which was accordingly given in by Black, and in which he stated:—'In conformity with your Honour's interlocutor, the 'pursuer will now enumerate the articles of property belonging 'to him, which, in the false idea that they belonged to his sister, 'were taken from his house by the defenders. He must first 'premise, however, that he does not intend the list to be sub-'mitted as a full and complete enumeration of his property carried 'from his house; on the contrary, he is well satisfied that seve-'ral valuable articles have entirely escaped his recollection.'—'In 'the mean time the pursuer condescends and states that the 'following articles, which are exclusively his, were among those 'removed from the house by the defenders, viz. a silver watch—'another do.—one half dozen silver tea-spoons, and silver tongs '—three gold rings set with stones,'—along with the title-deeds of a certain property, in which he had a joint interest with his sister. This condescendence was signed by Black himself; but, on a proof of it having been allowed, he failed entirely to establish that any articles such as those enumerated by him had been carried away; while, on the contrary, a very strong presumption arose from the evidence that he was never possessed of any such,—none of the persons examined, some of whom had long known him, having ever seen any such articles in his possession.

The Magistrates having assoilzied Brown, he raised an action

of damages against Black, also before the Magistrates, founding on the statements in the summons and condescendence above mentioned, which he characterized as 'utterly false and groundless,' and as amounting 'to little less than a charge of housebreaking and theft, or, in the most favourable way in which it 'can be construed, to an accusation of gross malversation of professional duty and breach of trust, in obtaining access to a man's 'house under colour of law, and then clandestinely and feloniously carrying off effects to which the pursuer had no right in 'any manner of way.'

The Magistrates having awarded £50 of damages, Black brought an advocation, in which he contended,

1. That the statements made by him in his petition and condescendence were not in themselves libellous, and did not bear the construction put on them by the respondent, as they merely amounted to an averment that the respondent had taken away articles belonging to the advocator, 'in the false idea that they 'had belonged to his sister;' and,

2. That they were pertinent, and made on probable grounds in the course of judicial proceedings, as it was admitted by the respondent that he had carried away a great many articles out of the house possessed jointly by the advocator and his sister, without leaving any inventory with the advocator; and that the mere failure to establish these averments was not sufficient to subject him in damages, without positive proof of their having been maliciously made, which was not attempted.

To this it was answered,

1. That the statements clearly bore the interpretation put on them by the respondent, and could mean nothing else; and,

2. That the allegations as to the specific articles said to have been carried away, were not pertinent to the subject-matter of the petition presented to the Magistrates; and that the absolute falsehood of the charges, and total want of all probable ground for them, appearing from the certainty that no such articles ever existed, was sufficient proof of malice, the more especially as all these allegations might properly have been made in the former process, had there been any foundation for them, other than the malicious desire of libelling the respondent.

The Lord Ordinary, 'being of opinion that damages are due, 'and there being no plea on record that the damages are excessive,' remitted simpliciter.

Black reclaimed; but the Court, while they modified the damages to twenty guineas, by a majority adhered quoad ultra.

LORD JUSTICE-CLERK.—The first fact which is of importance to attend to is, that there was a process by the trustees, in which the right of the advocator under the trust-deed was brought under consideration of the Magistrates, and decided by them by an interlocutor acquiesced in by both parties. In that process it was competent for the advocator to have made his allegations as to abstraction of his effects, and to have obtained judgment on them; and unless there had been clear proof of malice, I would have allowed the strongest allegations as to abstraction of his property. But there was no insinuation of that kind till the second process brought two years after matters had been adjudicated by the Magistrates. He then puts in a new application; and although warned to be careful in insisting in this posterior process, he yet gives in a condescendence, signed by himself, alleging matters which could only be known to himself, and minutely enumerates articles, as exclusively his, which he alleges had been carried off by the defender. This was an averment of fact peculiarly known to himself. He was allowed a proof; but not a single person who knew him best gives the least countenance as to the taking away of all the articles condescended on by him; there is no vestige of his even having been possessed of any thing of the kind, except perhaps a trifling ring, and that not gold. The allegation being thus utterly false, and not being pertinent to this process, the question comes to be, Whether such an allegation, made against a professional man, can be protected, allowing the freest latitude to litigants as to matters pertinent, which I shall always be inclined to do, as stated by me fully in my opinion in the case of Robertson, which went afterwards to the House of Lords; but it does appear to me that these allegations are not pertinent, and that there was no colour for the averments, but that they were mere inventions; and being persisted in against a professional man, the advocator has exceeded the privileges of a litigant, and become liable on the principle that legal proceedings are not to be made a cover for slander. I am therefore for adhering to the interlocutor of the Magistrates, except as to the amount of damages, which, considering the advocator's age and other circumstances, I would reduce at least to one half.

LORD PITMILLY.—I have come to the same conclusion. At first I thought the question depended on the petition to the Magistrates, and on that account I thought the interlocutor wrong; but it is necessary to attend to what is afterwards stated, for a great change is made in the condescendence from what is in the petition. In the petition there is no mention of watches, &c., but only of papers or money, vaguely alleged. The advocator is then ordered to condescend, after having been put on his guard. There was no order to sign the condescendence himself, but he steps forward and takes the cause out of his agent's hands, and gives in a condescendence himself, which says little of the papers mentioned in the petition, but

contains the new allegations as to the watches, &c. On these grounds, I think that this process was made for the purpose of defaming Brown, and that the advocator is not entitled to the privilege of a litigant. There are no grounds to suppose he believed that he had been possessed of the watches, &c.; if he had reason to believe so, he would have been protected, but I think he knew he had no such articles, and therefore I think damages are due; but they have been estimated too high, as this pursuer has not quite clean hands himself.

LORD ALLOWAY.—I take a different view of this case. We are sitting here as a Jury to ascertain if there has been slander, and to assess the damages, and in this view, I think the most important point is the nature of the allegation made to the Magistrates in October 1824. Supposing the goods to have been the property of the advocator's sister, he had his liferent of the whole effects, and although the trustees might take an inventory of them, they must have remained in the possession of the liferenter. This was an old man of 75, and the parties, who were his trustees as well as his sister's, come to take possession of his sister's effects of which he is in possession, and entitled to liferent, and, in endeavouring to keep these people out of his bed-chamber, he is knocked down, and had three of his ribs broken. I do not think such circumstances ever occurred before, and I cannot lay them out of view. The petition was presented in October 1824. There was no felonious charge in it; the allegation merely was, that the respondent took away what belonged to the advocator under a mistake, and without leaving an inventory. There is no room for accusation of slander here. Then, as to the rest of the process, I think the other party has more cause to complain of statements in the answers than Brown of those in the petition. A condescendence was then given in, but I cannot discover in it any animus injuriandi. On the contrary, I think that it excludes the idea of any animus injuriandi. It says, that 'in the false idea that they (the articles) belonged 'to his sister,' they were taken away, &c.; and it has been ascertained in the previous process, that no inventory was left of any of the articles taken away, and which were taken undoubtedly without authority. All that the advocator complains of is, that they were taken under a mistaken view. He then certainly states specific articles, and I admit that the proof does not instruct that any of these articles were removed. That, however, was the only article of probation. Whether he ever possessed them, was not an article to be proved; and I admit further, that there was no evidence that such articles ever belonged to him. There is merely no proof that he ever possessed them, but I cannot presume he had not such articles as one half dozen of silver tea-spoons, &c. Is it improbable that he was not possessed of such articles as those enumerated? I do not suppose there is a person in Glasgow in his condition that is not possessed of silver tea-spoons, and if they were in the house, and liferented by him, it matters not whether they were his sister's or his, and I cannot assume him guilty of slander,

because he says he was possessed of these articles. If I can presume an honest intention, I am not bound to presume a slanderous intention. I cannot see where the slander is, and a party should surely come into Court with clean hands, which is not at all the case here; for if any action for slander lies at all, it is more on the other side. I think there is no cause for damages at all, but if any, five shillings is enough.

Lord Glenlee.—I agree with Lords Justice-Clerk and Pitmilly. Suppose the advocator had, in addition to what he has stated, expressly put into his condescendence that he did not mean to charge the respondent with theft, but only with a mistake, that would have been nothing more than a protestatio contraria facti, just like pulling a man by the nose, and telling him you did not mean to insult him. If there had been any probable ground for his belief of possession, it might have protected him from his allegations being held malicious; but from the proof I am satisfied that he must have known the allegations to have been contrary to the fact, and must therefore be liable in damages. It is said the only matter of proof was, whether the articles were carried away; but the first step in that was to prove that he had them, and the witnesses were interrogated on this point, and the other party was at least entitled to prove the contrary. Therefore, on the whole, I think it distinctly made out that the allegations must have been made malâ fide, and malice is necessarily to be inferred from that.

R. and A. Kennedy, W. S.—Campbell and Macdowall, W. S.—Agents.

No. 258.

G. Brown, Complainer.—*Cockburn.*

Duke of Gordon, Respondent.—

Judicial Inspector.—A professional person employed in a cause by order of the Court to make an inspection, entitled to decree for his account against both the parties, conjunctly and severally.

March 2. 1827.

2d Division. Lord Mackenzie. B.

In the action of reduction at the instance of the Duke of Gordon against Innes, mentioned Vol. III. No. 11, it was moved by the defender that the ameliorations made by him on the estate of Durris should be ascertained before decree of removing was pronounced. This was opposed by the Duke of Gordon; but the Court appointed it to be done, and remitted to Mr. Brown, land-surveyor, to inspect the property, and report on the meliorations. Mr. Brown accordingly did so; and, some time thereafter, on a motion made at the Bar by the Duke of Gordon, in absence of Mr. Brown's counsel, the Lord Ordinary found 'the Duke 'of Gordon and Mr. Innes each liable in a half of Mr. Brown's 'account.'

Against this interlocutor Mr. Brown gave in a reclaiming note, and contended that, having been employed professionally, on a remit by the Court, he was entitled to a decree, conjunctly and severally, against both the parties, who might settle between themselves their respective liability in a question with each other.

This was opposed by the Duke of Gordon, who contended that, having opposed the remit to Mr. Brown altogether, decree ought not to go out against him for more than the one half share of Mr. Brown's account.

The Court unanimously altered the Lord Ordinary's interlocutor, and decerned against both parties, conjunctly and severally, reserving their mutual claims of relief.

W. Robertson, W. S.—J. S. Robertson, W. S.—Agents.

R. Murray, Pursuer.—*Jardine.*
Laurie's Trustees, Defenders.—*Sol.-Gen. Hope—M'Neill.*

No. 259.

Reference to Oath—Trustee.—Reference as to resting owing of a bill of exchange to the oath of trustees of a party deceased allowed, reserving all objections to the effect of the oath when taken.

March 2. 1827.

2d Division. Lord Mackenzie. M'K.

This was an action at the instance of Murray against Thomas Laurie and the trustees of the late James Laurie, under a trust-deed of settlement, of whom Thomas was one, for payment of a bill for £105, dated in 1806, and accepted jointly by Thomas and James Laurie. No appearance was made for Thomas Laurie, and decree accordingly passed against him; but a defence was given in for the trustees of James Laurie, pleading the statutory limitation, by the lapse of six years. This defence having been sustained, Murray tendered a reference of resting owing to the oath of the trustees, to the competency of which it was objected, that a debt could not be reared up against a party by a reference to the oath of others, who had no real interest in the matter, but were merely trustees, and could not legally depone to any thing not regarding their own actions; and in so far as one of the trustees, Thomas Laurie, was concerned, that he was disqualified by his interest to be relieved of one half of the bill, for which decree had gone out against him.

To this it was answered, That the statute introducing the limitation of bills allowed the debt to be proved by the oath of the debtor, and that the trustees were here the debtors; but that, at all events, whatever effect the oath of the trustees might have against the estate, or those beneficially interested in it, was a

question after the oath was taken, and could form no bar to the competency of the reference.

The Lord Ordinary reported the case, and the Court, after delaying it for further consideration, allowed the reference, except as to Thomas Laurie, reserving all questions as to the effect thereof to all or any concerned.

Lord Glenlee.—It would be too much to lay down an universal rule that the oath of trustees on a reference will affect the estate. This will depend on the powers given to the trustees and other considerations. In general, however, I would allow the oath to be taken, reserving all objections to its effect. Even in the case adverted to by Erskine, the oath was taken, but effect was denied it against certain persons. It would be dangerous to go further than this;—and as to the trustee, who has submitted to a judgment against him, I do not think he ought to be examined.

Lord Pitmilly.—This is not the proper stage to determine the effect of the oath, but merely whether it is to be allowed at all. I do not see that Erskine states the oath not to be competent, but he speaks of its import as if it were taken; and certainly in practice the competency of such a reference has never been doubted. It may be of no use, but it must be taken.

Lord Alloway.—I do not think the words of the statute make any difference, as the question always is, who is the debtor? And surely a trustee or a tutor is not the debtor, which means the person truly liable for the debt. The object of an oath on reference is to put an end to litigation; but, if the oath of the trustees should prove negative, would that prevent it being referred to the heir when he comes of age? It certainly would not;—and as the principle for allowing an oath does not apply here, the parties to whom it is proposed to refer, not being those having the real interest, and as our authorities seem against such references, except in matters relative to the trustee's own actings, I am for disallowing it.

Lord Justice-Clerk.—I agree with Lords Glenlee and Pitmilly. I do not conceive we are in any danger of running counter to Erskine, even were his authority more pointed than it is. But, admitting entirely his doctrine as to executors, which he illustrates by reference to the case of a trustee, when the truster is in life, I conceive there is a great difference between this and the case of a trustee of a party deceased, vested in the universum jus of his property, and with power to pay all his debts, &c. Supposing such a trustee brings an action for payment of debts, which is met by a plea of compensation, referred to the oath of the trustee, I could see nothing incompetent in such a reference. Or, suppose that the trustees were by the trust-deed specially directed to pay a particular debt, could the creditor not refer that to his oath? I certainly think he could; and I am

therefore for allowing the reference here, reserving all questions as to the effect of the oath when taken.

J. G. DAVIDSON, W. S.—LINNING and NIVEN, W. S.—Agents.

C. ARROT, Pursuer.—*D. of F. Moncreiff—Buchanan.* No. 260.
Dr. WHITE and Others, Defenders.—*Jeffrey—More.*

Nuisance—Verdict.—A verdict having been found for a pursuer in an action for abating a nuisance, decree pronounced in terms of the libel.

March 3. 1827.
1st DIVISION.
Lord Eldin.
D.

IN this case the only point involved related to the application of a verdict. Arrot had brought an action of damages, and for removal of a nuisance which he alleged had existed for many years in the neighbourhood of his villa, but that it had not become peculiarly offensive till the 1st of January 1816, since which time, with some intervals, it had been highly injurious to his property and comfort.

Issues were sent to a Jury, both as to the allegation of nuisance, and a defence of acquiescence, and a verdict having been found on both for Arrot, the defenders contended, That, from the mode in which his summons was laid, he was only entitled to have the nuisance abated to the state in which it was on the 1st of January 1816; and the Lord Ordinary found accordingly But the Court altered, and ordained the defenders 'to cease 'and desist from carrying on the noxious manufactures com- 'plained of in the libel within the works therein mentioned, and 'prohibited and discharged them from continuing the said opera- 'tions in all time coming, conform to and in terms of the conclu- 'sions of the libel.'

J. YOUNG,—C. F. ORR, W. S.—J. and W. JOLLIE, W. S.—W. and A. G. ELLIS, W. S.—Agents.

J. C. BRUCE, Suspender.—*Handyside.* No. 261.
P. BORTHWICK, Charger.—*More.*

Forgery.—Bill of suspension passed simpliciter of a charge on a bill appearing, comparatione literarum, to be forged.

March 3. 1827.
1st DIVISION.
Bill-Chamber.
Lord Newton.
H.

BRUCE of Balchristie having been charged by Borthwick, manager of the National Bank, for payment of a bill drawn by George Houy, and apparently accepted by Bruce, presented a bill of suspension without caution or consignation, on the ground that it was a forgery. The Lord Ordinary passed the bill simpliciter, and the Court, being satisfied of the fact comparatione literarum, adhered.

D. and R. BLACKIE, W. S.—A. W. GOLDIE, W. S.—Agents.

No. 262.

J. WILSON, Advocator.—*Wilson.*
H. JAMIESON, Respondent.—*Jameson—Fletcher.*

Process—6. *Geo. IV. c.* 120.—A record having been closed in relation to certain allegations, and a remit made to the Jury Court, and it having been proposed to make an issue as to a point not in the record; and this having been objected to, and the case sent back to the Court of Session to have this rectified; and the Lord Ordinary having allowed a new condescendence on condition of payment of the previous expenses, and the party having reclaimed as to this condition, and the other party having acquiesced; the Court adhered; but Observed, that such an order was incompetent.

March 3. 1827.

1ST DIVISION. Lord Eldin. D.

JAMIESON, as clerk of the road trustees for the district of Carrick in Ayrshire, presented a petition to the Justices of the Peace against Wilson, in which he stated, that by certain operations he had formed an obstruction on a public road within that district; and founding on the road act 45th Geo. III., he prayed that Wilson should be ordained to remove the obstruction, and to be subjected in certain penalties. The defences relied on were,

1. That the complaint had not been made, according to the statute, in due time; and,

2. That the road was not a public road, but was a private servitude road.

The Justices having decerned in terms of the prayer, and Wilson having advocated, Lord Alloway appointed him 'to lodge 'a condescendence of what he offered to instruct, in order to es- 'tablish that the road in question is a private servitude road not 'falling under the trust management, and also that the appli- 'cation was not made within the period provided by the act of 'Parliament on which it was founded.'

A record confined to these points was then made up and closed by Lord Eldin, after which the case was remitted to the Jury Court. The clerks of that Court having suggested that an issue should be taken as to whether there had been an obstruction or not, it was objected by Jamieson, that as the record was confined to the two points specified in the interlocutor, and it was now closed, it was incompetent to make an issue on a point not included in the record. The case, however, was sent back to the Court of Session, with the view of having this rectified; and Wilson then moved the Lord Ordinary to allow him to give in a new or additional condescendence. This was resisted by Jamieson, unless the previous expenses were paid; and the Lord Ordinary having heard parties' procurators 'upon the state of the 'process as now remitted from the Jury Court, and the demand 'made in behalf of James Wilson, advocator, to be allowed to

'give in a new or additional condescendence, found, that before 'being allowed to give in any new or additional condescendence, 'the advocator must pay the expenses hitherto incurred by the 'respondent; and appointed the advocator to be ready to state at 'next calling if he is or not willing to pay the previous expenses 'before condescending of new.'

Wilson then reclaimed, and contended that he was not bound to pay the previous expenses; but the Court adhered.

The Court were of opinion, that as the record was closed, it was incompetent to receive a new condescendence; but as the respondent had not reclaimed, and had therefore acquiesced in the interlocutor, they could only adhere.

W. MERCER, W. S.—DONALDSON and RAMSAY, W. S.—Agents.

W. ADAIR, Advocator.—*Sol.-Gen. Hope—Wilson.*
Mrs. ADAIR and Others, Respondents.—*Monteith.*

No. 263.

Process—Proof on Commission—Commissary Court.—In a declarator of legitimacy, in which a proof was granted of the marriage of the parents—Held competent to take it on commission, in respect of the poverty of the pursuer, and the necessity of the case.

March 3. 1827.

1ST DIVISION. Bill-Chamber. Lord Newton. H.

WILLIAM ADAIR, alleging that he was the lawful son of the late John Adair of Cross Arthurlee, brought an action of declarator of legitimacy before the Commissaries of Edinburgh against Mrs. Adair and others, the sisters of his father. In defence it was admitted that he was the son of John Adair, but it was alleged that he was a bastard; that his mother had been Adair's kept mistress for some time; that she was of the lowest rank in society, whereas he was a person in opulent circumstances; that her subsequent conduct indicated that she did not regard herself as his wife, and that accordingly during his life she had married another man.

To this it was answered, That the pursuer would prove that both prior and subsequent to his birth, they were habit and repute husband and wife; and of this the Commissaries allowed a proof. The pursuer then moved for a commission to take the proof in Paisley and Glasgow, stating, that as he was a journeyman wright, earning wages of only 15s. per week, (of which he produced a certificate from the elders of his parish,) and as it would be necessary to bring to Edinburgh sixty or seventy witnesses, and to maintain them there during the proof, it was not within his power to do so.

On the other hand, the defenders contended, That as it was the

general rule that the proof should be taken in presence of the Court itself, and as this case was of an important and delicate nature, and as the witnesses were all in the lowest rank of society, so that there was danger of combination, and as poverty was no reason for deviating from the established rules of law, a commission ought not to be granted. The Commissaries refused to grant the commission, and having thereafter circumduced the term and assoilzied the defenders, the pursuer presented a bill of advocation, praying for a remit with instructions to the Commissaries to recall these interlocutors, and to grant commission to the Commissaries of the bounds, or to any other commissioner, for taking the proof.

The Lord Ordinary having reported the bill with answers, the Court remitted with instructions to recall the interlocutors, and to allow the proof to be taken on commission as prayed for.

Lord Balgray.—I do not see any objection in point of law to a commission being granted, and I think a case of sufficient necessity has been made out. Indeed the defenders ought, for their own sakes, to have the question fairly tried, because, notwithstanding the present absolvitor, any creditor of the pursuer may afterwards come forward and attach the estate of Mr. Adair, on the footing of the pursuer being his son and heir. They ought, therefore, rather to facilitate the investigation; and if they wish the witnesses to be examined here, I would advise them rather to pay the expense, than to allow the matter to lie over in uncertainty.

Lord Craigie.—I am perfectly satisfied, that unless the defenders agree to pay the expenses of bringing the witnesses here, a commission should be granted. This is not a question of property, but of status, which should be determined during the life of the pursuer, and consequently every facility should be given to enable him to bring forward his proof.

Lord Gillies.—I have great doubts as to granting such a commission. The poverty of the pursuer may affect our feelings, but we must throw these aside in judging of a question of law. Hitherto it has only been in cases of absolute necessity that a commission has been granted for taking proofs of this nature. But the only necessity which is here alleged is the poverty of the pursuer. It is not said that the witnesses are unable to travel either from bad health, age, or otherwise;—all that is said is, that the pursuer is a poor man; but if we are to grant a commission on that ground alone, then this would be a good reason for taking proofs on commission in the Jury Court, and thus in every case where a man was in poor circumstances, the witnesses, instead of being brought before the Jury, would be examined on commission. I therefore regard this as a most dangerous precedent.

LORD PRESIDENT.—There is a manifest distinction between the Jury Court and the Commissary, for the former travels over the country, whereas the Commissaries are stationary at Edinburgh. It is no doubt the general rule in that Court, that a commission is not to be granted, but it is not invincible; and as I consider that this case forms an exception, I think the commission should be granted, unless the defenders will agree to pay the expenses of bringing the witnesses here.

D. WILSON, W. S.—W. and A. G. ELLIS, W. S.—Agents.

A. CAMPBELL, Pursuer and Suspender.—*Sol.-Gen. Hope—M'Farlan.*
R. HILL, Charger and Defender.—*Cuninghame.*

No. 264.

OATH on reference in the case ante, Vol. V. No. 42. The Court found it negative.

March 3. 1827.

2D DIVISION. Lord Reston. M'K.

TOD and WRIGHT, W. S.—J. DONALDSON,—Agents.

DUKE of QUEENSBERRY'S EXECUTORS, Pursuers.—*Rutherfurd.*
C. TAIT, Defender.—*D. of F. Moncreiff—Tait.*

No. 265.

Agent and Client—Expenses.—1.—The executors of a client having insisted that the business accounts of his agent for a series of years, which had been rendered and not objected to, but which had not been docqueted, should be audited; and the agent having been in a great part successful, both in relation to the amount of the charges, and to other litigated points—Held,—1.—That he was entitled to modified expenses.—2.—That it was not an objection to decree going out in the name of the agent in the cause, who had appeared as such from the commencement, that the party himself (who was a practitioner before the Court) had chiefly taken the management of the process.

MR. TAIT and his father had been agents for the Duke of Queensberry, and their business accounts, although rendered and not objected to, had not been formally docqueted since the year 1778. In 1812, after the Duke's death, his executors refused to hold the accounts as settled, and raised an action of count and reckoning, in which they insisted on having the accounts audited. Having succeeded in obtaining a judgment, finding the accounts still liable to be audited, (ante, Vol. I. No. 486,) they were remitted to Mr. Brown, an accountant, along with Mr. Tait's subsequent accounts with the executors till Martinmas 1817. The accounts embraced a period of 40 years, and amounted to £ 40,677 : 6 : 1, from which Mr. Brown struck off £5701 : 10 : 5.

March 3. 1827.

2D DIVISION. Lord Pitmilly. B.

Mr. Tait having objected to this report, the Court remitted the accounts to Mr. Roger Aytoun, W. S. along with Mr. Brown,

who having reported, their Lordships, after considerable litigation, reduced the taxations made by Mr. Brown to £3262: 11: 3, but repelled Mr. Tait's objections to the mode of accumulating interest adopted in the report, (ante, Vol. V. No. 112.) In the mean time another question had been agitated, whether Mr. Tait was bound to consign the sum contained in an heritable bond granted by him to the Duke of Queensberry, which sum had been lent to Mr. Tait, and was to be answerable for any claims of damages which might be due to the Queensberry tenants, in the event of the reduction of their leases, which Mr. Tait had warranted personally, as well as on behalf of the Duke. In this question the Court found that Mr. Tait was not bound to consign till relieved of the obligation of warrandice. At the issue of the whole litigation, the Court found Mr. Tait entitled to expenses, subject to modification. The executors had agreed to pay the expense of auditing the accounts before Mr. Brown and Mr. Aytoun, and the expenses now sent to the auditor, prior to modification, were those incurred by Mr. Tait in the discussions in Court. The auditor having taxed the accounts, reported them to the Court, as included under the four following branches.

Branch I. Comprehending the question whether the accounts up to 1809 should be held to have been settled in the lifetime of the Duke of Queensberry, - - - - - -	£67 15 10
II. Comprehending the discussion as to the consignation of the heritable debt, - -	76 8 2
III. The discussion as to the accumulations of interest, - - - - -	69 6 3
IV. Regarding the correctness of Mr. Tait's law charges, &c. - - - -	547 15 11
	£761 6 2

The Court disallowed entirely the first branch, allowed the second in full, modified the third to £50, and the fourth to £500, thus reducing the whole to £625, for which it was craved by Mr. Clark, W. S. as Mr. Tait's agent, that decree should be allowed to go out in his name. This was objected to on the part of the Queensberry trustees, to whom Mr. Tait was still indebted a considerable sum, unless Mr. Clark would state that he had personally undertaken the whole trouble in conducting the cause, and had advanced all the outlay. To this it was answered, That Mr. Clark, as appeared from the papers, had been the acknowledged agent from the beginning of the process, and was not put forward

to evade the objection which there might be to decree going out in Mr. Tait's own name; that for a great part of the outlay, as printing, &c. he was undoubtedly personally liable; and that there was no ground for making such an unusual demand as that now insisted on by the executors.

The Court, without calling on Mr. Clark to make the declaration required by the executors, allowed decree to go out in his name.

LORD JUSTICE-CLERK.—Without entering immediately into all the different steps of this long process, it is quite enough that Mr. Tait, notwithstanding the severe ordeal to which he has been subjected, has succeeded to a very great extent. As to the first branch of these expenses, he was unfortunately unsuccessful in the question in which they were incurred, and although fairly entitled, in the circumstances, to try the question, he cannot be allowed the expenses. As to the second, he is clearly entitled to the whole. In the third, he was not entirely successful, but having been so to a certain extent, I would propose to allow it, under modification of striking off the odd sum above £50. As to the fourth branch, he is entitled nearly to the whole. In the circumstances, the executors were bound to pay for auditing the accounts, and I can attach no importance to the statement made at the Bar, that they have already paid £1500 to Mr. Brown for his reports, besides a large sum to Mr. Aytoun. In regard to decree going out in Mr. Clark's name, I see that on the whole of the papers in this voluminous process he is marked as agent from the very beginning, and he has always been acknowledged as such by the executors, all intimations, &c. having been sent to him. The case might be different, if a person were thrust in as agent at the end of the cause, to evade a plea of compensation. But that is not the case here. Mr. Clark has been all along known and acknowledged as agent, and is clearly liable personally for any expense that may be due to printers, &c. In these circumstances, I do not think it at all necessary to go into an investigation as to the extent of the charge taken by Mr. Clark, and I conceive that it would be quite immaterial that in a cause of such importance to him, Mr. Tait had personally taken a considerable charge of it.

The other Judges concurred.

J. GIBSON, W. S.—W. CLARK jun. W. S.—Agents.

No. 266. EARL of FIFE, Pursuer.—*Jeffrey—Cockburn—Robinson.*
Sir J. DUFF and Others, Defenders.—*D. of F. Moncreiff—Thomson—Fullerton.*

Expenses, and Interest on Expenses.—1.—The expenses of two Jury trials having been awarded, held that the expense of examining on commission a witness, whose deposition was afterwards read to the Jury,—of preparing issues in this Court,—of the discussion in this Court in obtaining a new trial,—and of opposing a bill of exceptions, fell under the award.—2.—Interest allowed on expenses.

March 3. 1827.

2D DIVISION. F.

THE Court having found Lord Fife entitled to the expenses of the two first Jury trials in the process between him and the trustees of the late Earl, mentioned ante, Vol. IV. Nos. 241. and 497, 'but to no other expenses,' the accounts were laid before the auditor, who reported for the consideration of the Court, whether the expenses incurred in relation to the following matters fell within the finding by the Court,

1. The expense attending the examination of a witness, whose deposition was afterwards read to the Jury on the trial under a commission from this Court.

2. That regarding the preparation of issues in this Court prior to the remit to the Jury Court.

3. The expenses of a discussion on an application for a new trial on a particular point, which was granted.

4. The expense of opposing the defenders' bill of exceptions, which had been disallowed; and,

5. Certain charges for general trouble on the part of the agent regarding the trials.

The auditor also submitted a claim for interest on these expenses made on the part of Lord Fife's agent.

For Lord Fife it was pleaded, That as to the first four articles, they were all essential either to the obtaining or supporting the verdict of the Jury, and therefore, on a fair construction of the interlocutor, fell within the expense of the trials; that the charges for trouble were in all the circumstances extremely moderate; and as to the claim for interest, that as very large sums had been advanced by the agent, which he had lain out of for a long time, if he were not allowed interest, he would in reality be a loser by his employment, the interest of the sums advanced greatly exceeding the charges for his own personal trouble and remuneration. The Court being satisfied that all the charges fell within the terms and meaning of the interlocutor, and that in so far as regarded the agent's own remuneration, they were exceedingly moderate, allowed the accounts in full, with interest thereon.

W. COOK, W. S.—J. and W. JOLLIE, W. S.—Agents.

—— KYLE, Pursuer.—*More.* No. 267.
HIS CREDITORS, Defenders.—*Sandford.*

Cessio Bonorum.—A pursuer of a cessio having been incarcerated for the full period of a month, and being ready to appear and submit himself to the orders of Court, held no objection to his title to pursue that he was not in jail at the date of raising the summons.

March 3. 1827.
2D DIVISION.

KYLE having been incarcerated for a month, and then liberated, raised and executed after his liberation a summons of cessio bonorum against his creditors. Being under the idea that the execution while out of jail was invalid, he was again incarcerated, and had the summons executed anew. When the cessio came to be pleaded, certain of his creditors objected to the competency of the action, on the ground that at the time of raising the summons the pursuer was not in jail, which they contended was essential to the validity of the action.

To this it was answered, That, to entitle a bankrupt to raise a process of cessio, it was only necessary that he should have been in jail by detention of his creditors for the full period of a month, and that the jus quæsitum so acquired was not lost by liberation before raising the summons, but that it was enough if the pursuer were ready to subject himself to the orders of Court at the time of deciding on the cessio, in case it should be refused, and he offered now to appear in Court, if required, and submit himself to their Lordships' orders.

The Court repelled the objection, allowed the cessio to be stated, and thereafter granted the benefit of it.

LORD GLENLEE expressed some doubts on the point, but the other Judges were clearly of opinion, that if the pursuer had been a month imprisoned, it was immaterial whether or not he were in jail at the time of raising and executing the summons.

SEA INSURANCE COMPANY of SCOTLAND, W. BRAIDWOOD, their Manager, and Others, Suspenders.—*Rutherfurd.* No. 268.
J. GAVIN and Others, Chargers.—*Forsyth—Neaves.*

Insurance.—Circumstances in which a shipping place not protected by any artificial works, was held to be a 'port' within the meaning of a policy of insurance.

March 3. 1827.
2D DIVISION.
Admiralty.
F.

BRAIDWOOD, as manager, and certain other persons as directors of the Sea Insurance Company of Scotland, underwrote, for behoof of the company, a policy of insurance on the brigantine Sarah of Leith, belonging to Gavin and others, 'at and from

'Leith to Shetland, and from thence to Barcelona, and at and 'from thence and two other ports in Spain to a port in Great 'Britain.' When the Sarah arrived at Barcelona, she found the plague so prevalent that the cargo could not be discharged, and she was in consequence ordered by the consignees to Tarragona, where she unloaded. She then proceeded to the bay of Saloe, about five miles to the westward of Tarragona, to ship her homeward cargo, and while lying there in the same situation with other vessels likewise loading there, part of her cargo only having been taken in, she was driven ashore by a hurricane, and totally wrecked. In an action on the policy in the Court of Admiralty as for a total loss, the Sea Insurance Company pleaded in defence, That Saloe, where the Sarah was wrecked, was not a port within the meaning of the policy. Issue having been joined on this, the Judge-Admiral allowed a proof by commission, from which it appeared that Saloe bay was about 13 miles in breadth, and was protected by the point of Saloe from all winds except those ranging from east round by south to west, and was fully as safe even in such winds as any of the ports in that part of the Mediterranean:—that there was no mole or pier which could afford protection to ships, or at which they could load, but merely a jetty, alongside which the country feluccas and small vessels not drawing more than five feet water could lie, and where these feluccas took in the cargoes to be conveyed to the ships lying at the usual station, about a mile and a quarter from the shore, at which station, being about two miles within the point of Saloe, the Sarah was along with other vessels at the time of the wreck:—that there is a small town at Saloe with considerable warehouses for goods, and likewise a customhouse establishment, attached, however, to the customhouse of Rous, a town lying about eight miles inland, where the merchants carrying on trade at Saloe reside, and where also a British consul resides for the protection of the trade at Saloe, which place he generally visits daily:—that there is also an officer called the Port Captain established at Saloe to regulate the stations of the vessels, by direction of whom, and of the customhouse officers, the Sarah was moored; and, lastly, that Saloe is a place of very extensive trade, but chiefly for export, as vessels seldom discharge their cargoes there. Evidence was also led as to the character of the harbours of Barcelona and Tarragona, which are both furnished with moles to which vessels can be moored, and where they can discharge their cargo, although it appeared that, in the hurricane which caused the wreck of the Sarah, out of 60 vessels lying at Barcelona only one escaped. There was further adduced evidence of various persons connected with in-

surance-houses, as to whether they considered Saloe to be a port in the sense made use of in policies; but their opinions were contradictory; and evidence was also led to show that there were two well-known forms of policies,—in particular, one to 'ports' alone, and the other to 'ports or places,' the premium being considerably higher for the latter than the former.

On this proof the Judge-Admiral ordered memorials, in which it was contended for the underwriters, That Saloe was not a port in the meaning of a policy merely to 'ports,' and not to 'ports 'and places,'—'ports' being understood to mean harbours having artificial works for their protection; but that this was merely an open roadstead, which could not be made a port merely by a custom-house being stationed there, (this being the case in every bay in Spain where it was possible to land goods,) and which fell within the other form of policy 'at and from ports or places,'—a form implying a higher risk, and always used when intended to cover shipping places of the description of Saloe; but further, that the policy being to Barcelona and two other 'ports,' it necessarily meant two other ports of the same description with Barcelona,—viz. having a regular mole or pier for the protection of ships.

On the other hand, it was contended for the owners, That although being within the bounds of a custom-house did not constitute a port, yet the circumstance of a place being acknowledged by the general usage of trade, and the sanction of the government of the country, as adapted for the loading of vessels, did make such place a port, although there might be no artificial works for the protection of the shipping, as was the case with Funchal in Madeira, Madras, Lerwick, and several other natural harbours; and that Saloe, being acknowledged by the general usage of trade, and by the government of Spain, as a port, and being so held and denominated by the inhabitants, must be considered to be a port in the meaning of the parties in entering into this contract of insurance.

The Judge-Admiral found it proved 'that Saloe in Spain, 'where the Sarah was wrecked, is a port within the meaning of 'the policy in question, and that the vessel was within the same 'at the time the loss took place,' and therefore repelled the defences, and decerned in terms of the libel; and in a suspension by the Insurance Company, the Court, after disposing of the preliminary objection mentioned ante, No. 226, by a majority repelled the reasons of suspension.

Lord Justice-Clerk.—This question depends partly on fact, and partly on the true construction of the terms of the policy; and it does appear to me, that although there is no evidence of there being at

Saloe a proper mole, pier, or artificial works necessary to constitute an artificial harbour, yet there is a jetty for small craft, in which goods are shipped, to be put on board vessels lying as near the shore as may be. There is also a custom-house; and although it is not enough to constitute a port that it is within the jurisdiction of a custom-house, it is still a circumstance of importance that there is at Saloe a regular custom-house establishment. It is also of importance that a British consul is placed there; and that it is the constant usage for vessels to load at Saloe in the situation where the vessel here insured was lying when lost. Under all these circumstances, it appears to me that Saloe must be held to be a port under the terms of this policy. It is dealt with by the government of the country as a port, and it is used as a place for trade. It is also very material, in my view of the case, that it is true, in point of fact, that there are many natural harbours in which the artificial works are as nothing. There may be many natural basins where there are no works at all, but where trade is carried on to a considerable extent; and I am not prepared to say that such natural harbours are not to be considered as ports. On the whole, looking at the proof, I think there is sufficient evidence to hold that, in the understanding of trade in general, Saloe is to be considered a port, and, except in particular winds, it seems a very safe place. I am therefore of opinion that the insured are entitled to recover.

Lord Glenlee.—I agree in general with your Lordship. It is impossible to consider 'port' as synonymous with 'harbour.' There is something vague as to the notion in one's mind of what constitutes the essence of a 'port.' It rather strikes me that it means a place authorized by the government of the country, and where, by usage of trade, vessels are accustomed to resort for loading or delivering of cargo; and wherever such usage prevails, there will also be more or less convenience or security for the purposes of trade. This definition also coincides with the origin of the word, as a place to which goods are carried. To be sure, a number of ports may have harbours formed by artificial piers, quays, &c.; and if there be a harbour, I can understand how a vessel may not be considered in port, unless lying in the harbour, as it must always be understood that she is to go to the port as other vessels do, viz. to go into the harbour where other vessels deliver their cargoes. But it is quite different if there be no harbour, and she has gone to the only place frequented by vessels, as was the case here. The vessel, in this case, was in the same situation as the other vessels at Saloe. In the sense of the country, Saloe is a well-known port, with a custom-house and consul. Suppose the vessel had, on her return, put into Lerwick, (where I understand there is no artificial harbour, but which is a port commonly resorted to in trade,) and had been lost there, would we not have held it within the policy? And I do not think the case, as it stands, is materially different.

LORD PITMILLY.—This is a nice and difficult Jury question, and it ought to have been sent to a Jury. My opinion has varied at different times, and I still have doubts of the Judge-Admiral's interlocutor. The principal witness, Strachan, in his examination in chief, states 'that there is a pier at Saloe, and along the further end of it the 'water is of the depth of from 15 to 16 feet,' and 'that he has seen 'nine vessels at a time moored alongside the pier.' If this had been the fact, there could have been no question; but, by his subsequent examination, and that of the other witnesses, it is clearly made out that there is no pier or quay of any kind for foreign vessels, or vessels drawing more than four feet, but just a small jetty, where the country feluccas load. This, therefore, creates a difficulty in my mind. There is another point of difficulty. It is made out that in practice there are two different kinds of insurance policies,—some 'to a port or ports,' others 'to ports and places.' If there were no such insurance as the latter, and the constant practice was to insure only to ports, it would have been a different thing. But where, technically, there is a different form to cover places not falling under the proper description of ports, and Saloe being in common description a place, in what cases are we to use 'place,' if not in such as the present? The question is one of construction, what was the meaning of parties? And in this view I have considerable difficulty, though no opinion so confident as to induce me to alter the Judge-Admiral's interlocutor. I must therefore concur with your Lordship in repelling the reasons of suspension, although I certainly do so with very great difficulty.

LORD ALLOWAY.—This case ought certainly to have gone to a Jury; but the proof having been taken by commission in the Inferior Court, we are now called on to give judgment on it as it stands, and I confess that I entertain similar doubts with those expressed by Lord Pitmilly. This is a difficult question, and has not been determined either here or in England, though some judgments in the English Courts certainly come very near it. It is impossible to doubt that ports and places have entirely different meanings. I suspect that the form of insuring 'to ports or places' existed long before the last war. But, be that as it may, we see what the Scotch and English brokers say as to the distinction between such an insurance and that to ports only: the former is considered a greater risk, and this distinction is of considerable importance in determining the question. A port, in common language, is certainly different from a place, and I therefore conceive that a port must mean a harbour—a place for the protection of ships. The mere circumstance of a custom-house being situated at any place can never make it a port; and indeed all the witnesses say, they know of no bay in Spain without a custom-house to prevent smuggling. The British consul too lived at Rous, a distance of eight miles. As to the actual situation of Saloe, it appears from the proof to be a bay of from 15 to 20 miles wide. Take it as 15 miles wide,—surely a bay 15 miles wide cannot be called a

harbour. It is an open bay, in every sense of the term. No vessel can lie at the harbour or jetty; and it does not appear that cargoes are ever landed, but only shipped. Is it possible, then, to reckon it a port giving refuge to vessels, and affording that 'safety' which is a ruling consideration in all contracts of insurance? In common language, port is a place where a vessel rides at safety, with a pier, &c. to protect her,—statio tutissima nautis. The obligation of warranty in contracts of insurance, as in every other contract, must be construed in the strictest terms, and I do not think it can be held to apply here. The English decisions quoted in the papers as to seizure in port come very near this, as the two vessels taken at Pillau, in which the vessels were held not to be in port when they had arrived at the bar, where vessels always unload part of their cargo to lighten them, so as to enable them to pass the bar. On the whole, I am for sustaining the reasons of suspension.

Lord Justice-Clerk.—I wish it to be understood that my opinion does not at all rest on any idea of an insurance to 'ports' being the same with an insurance to 'ports and places;' they are perfectly distinct: but I hold Saloe to fall within the description of a port in the meaning of the policy; and as to the cases of seizure at Pillau, I cannot conceive how there ever came to be a question raised in the circumstances, the vessels not having got over the bar at the entrance to the port.

Lord Glenlee.—Whether the form of insuring to 'ports or places' originated during the war or not, I can easily conceive that places would be put in where it might be necessary to smuggle goods, perhaps on the open coast, where there is no convenience for trade at all; but the circumstance of places being different from ports cannot limit the construction of ports, or determine what a port is.

Suspenders' Authorities.—Constable *v.* Noble, 2. Taunton, 403; Cockery *v.* Atkinson, 2. Barn. and Ald. 460; 1. Marsh. 276; Brown *v.* Tierney, 1. Taunt. 517; Kenyon *v.* Scott, 4. Taunt. 660; Baring *v.* Vaux, 2. Campbell, 541.

Chargers' Authorities.—Comyn, Dig. voc. Merchant, Marine Insurance, 288; 1. Marshall, 6. 5; Noble *v.* Kennoway, 1. Marshall, 6. 5; Rucker *v.* London Assurance Company, (ibid.); Henry *v.* Royal Exchange Assurance Company, (ibid.)

Inglis and Weir, W. S.—W. Smith,—Agents.

LORD MACDONALD and Others, Complainers.—*Fullerton—Keay.* No. 269.
P. GRANT, Esq. Respondent.—*D. of F. Moncreiff—Sol.-Gen. Hope—Buchanan.*

Process—Freehold Qualification.—Freeholders having sustained a claim of restriction made by a freeholder, and allowed him to retain his place on the roll—Held that a petition and complaint against this resolution, merely praying to find that they 'did wrong in allowing the qualification to be restricted' without any prayer to have the party struck off the roll, was incompetent.

March 6. 1827.

1ST DIVISION.
Lord Newton.
D.

AT the meeting of freeholders of the county of Inverness, held on the 7th of July last, to elect a member of Parliament, a claim was presented by Patrick Grant of Lakefield, Esq. (who had been previously enrolled,) praying that his qualification might be restricted to certain portions of the lands on which his original enrolment rested. This having been objected to, on the ground that the lands to which he wished his claim to be restricted did not afford a freehold qualification, the meeting, after considering the objection with answers, 'sustained the claim of restriction, 'and restricted the claim of his original enrolment accordingly, 'and allowed the claimant to retain his place in the roll.'

Against this judgment Lord Macdonald and others presented a petition and complaint, in terms of the statute 30th Geo. III. c. 17, in which the prayer, after the usual motion for a warrant of service, and a remit to the Lord Ordinary to prepare the cause, was, 'to take the case into consideration—to find that the majority 'of the freeholders did wrong in allowing the qualification of the 'said Patrick Grant to be restricted in terms of his claim—to find 'the said Patrick Grant liable in expenses to the petitioners, and 'to decern.'

Against this complaint it was objected,

1. That it was inept and incompetent, in respect that although it is founded upon objections which import that the respondent, under his restricted claim, has not a sufficient valuation, it contains no prayer to have these objections sustained, or to have the respondent's name struck off the roll; or to have it found that the freeholders did wrong in continuing him on the roll; nor any conclusion under which the Court could be empowered to pronounce the only judgment which the objections, if well founded, would in law warrant.

2. That the complainers have not a legal title and interest to maintain the complaint as it is laid.

3. That there is no warrant in the election statutes, and no precedent in any decided case, for a petition and complaint in such terms as that now before the Court; and,

4. That it is not now competent to amend the prayer of the complaint, four months having elapsed from the date of the judgment of the freeholders.

To this it was answered, That the prayer was suited exactly to the nature of the complaint, that the application of the respondent to the Court of Freeholders was to have his original qualification restricted, i. e. to be allowed to stand on the roll on a part of the lands contained in that original qualification: That the appropriate legal objection to such an application was, not that the party ought to be struck off the roll—a consequence which does not necessarily follow from the demand of restriction being refused—but that the qualification ought not to be restricted, i. e. that the restricted lands, on which exclusively he wishes to continue on the roll, do not of themselves afford a sufficient qualification: That accordingly the petitioner, in the prayer, correctly craved the Court to find that the freeholders did wrong in repelling the objection, and granting the respondent's application; and the result of the success of the petition will be, to have the respondent's original qualification unrestricted, and consequently to subject it to the usual operation of any change of circumstances which may have taken place on it since the respondent was enrolled.

The Lord Ordinary having reported the objection, the Court sustained it, and dismissed the complaint.

Lord President.—The only jurisdiction which is given to us by the election statutes is to keep the roll pure. We have nothing to do with the findings of the freeholders, except to that effect. We might be of opinion that all the findings complained of were wrong, but that the conclusion at which the freeholders had arrived was right, and therefore that the complaint must be dismissed. As we can only entertain objections relative to admitting, striking off, or continuing a claimant on the roll, we must have such a case before us, otherwise we cannot listen to it. But here there is no prayer of that nature; all that we are asked to do, is to find that the freeholders did wrong in allowing the qualification of the respondent to be restricted in terms of his claim; but we are asked to do nothing more. It is impossible to sustain such a complaint.

Lord Balgray.—I am of the same opinion. There is here no prayer to have the respondent's name expunged from the roll, but merely to find that the freeholders did wrong in allowing him to restrict his claim. The petitioners, however, can have no interest to object to that, except to the effect of having him struck off the roll, for which they do not pray.

Lord Gillies.—I am of the same opinion. Every freeholder is en-

titled to restrict his claim, but after it has been so restricted, any other freeholder may object that he has not now a sufficient qualification, and therefore that he should be struck off the roll; but here there is no such prayer before us. Indeed, it appears to me somewhat extraordinary that any objection should have been made to the restriction, for if, when restricted, the respondent had not a sufficient qualification, the objectors, instead of opposing the restriction, ought rather to have consented to it, and then to have taken advantage of the change of circumstances, and so have got him struck off the roll.

J. A. CAMPBELL, W. S.—H. MACQUEEN, W. S.—Agents.

R. TULLIS, Pursuer.—*Sol.-Gen. Hope—Mackgill.* No. 270.
J. C. BRUCE, Defender.—*Jeffrey—G. Napier.*

THIS was a question of a special nature as to the regularity of a summons. The Lord Ordinary sustained it, and the Court, in respect that it resolved into a count and reckoning, adhered.

March 6. 1827.
1ST DIVISION.
Lord Meadowbank.

A. MONYPENNY, W. S.—D. and R. BLACKIE, W. S.—Agents.

E. DOIG and Others, Advocators and Suspenders.—*Jameson—Neaves.* No. 271.
J. FENTON and Others, Respondents and Chargers.—*J. Henderson jun.*

Stat. 6. *Geo. IV. c.* 120.—*Process—Expenses.*—Cause remitted to Inferior Court, in respect judgment was pronounced without making up a record; but expenses refused to complainer, on the ground of his not objecting in the Court below.

IN a process before the Dean of Guild Court of Dundee regarding some urban tenements, a judgment was pronounced in favour of Fenton without the record having been closed,—neither party having observed the omission. Of this judgment Doig brought an advocation, and likewise two suspensions, to prevent Fenton proceeding with certain operations on the tenements in question, authorized by the Dean of Guild. In each of these processes the Lord Ordinary pronounced this interlocutor: 'In 'respect the record in the Inferior Court has not been closed, remits to the Dean of Guild of Dundee to recall his interlocutor '—to reconsider the case—to close the record—and afterwards to 'pronounce judgment; but in respect the parties did not apply 'to the Dean of Guild to recall his interlocutor and close the record, finds no expenses in this Court due to either party.'

March 6. 1827.
2D DIVISION.
Ld. Cringletie.

Against these interlocutors Doig reclaimed, in so far as expenses

were not allowed, or at least reserved, and in the suspensions, in so far as interdict had not been granted as craved. The Court unanimously adhered.

RITCHIE and MILLER,—W. MURRAY,—Agents.

No. 272.

P. IRVINE, Advocator.—*Cockburn—Gordon.*
Mrs. M. THOM or FIDDES, Respondent.—*D. of F. Moncreiff—Lumsden.*

Landlord and Tenant—Faculty.—A tenant under a lease for 38 years, and thereafter during the lifetime 'of any person to be condescended upon by him by a 'writing under his hand,' held to have validly exercised the power in favour of his eldest daughter by a nomination in these terms:—'I do hereby nominate and 'appoint the heir-male procreated of my body, and existing at the expiration of 'the said 38 years; whom failing, I do nominate and appoint my eldest daughter 'then in life.'

March 6. 1827.

2D DIVISION.
Lord Medwyn.
M'K.

IN 1795 the late John Thom obtained a tack from the then proprietors of the lands of Pettans, (now belonging to the advocator,) whereby they let 'to the said John Thom, his heirs and 'assignees, all and haill the said lands of Pettans, &c. for the 'space of 38 years;' and 'after the expiry of the foresaid space 'of 38 years, for and during the lifetime of any person to be con-'descended upon by the said John Thom, by a writing under his 'hand, before the expiration of the foresaid space of 38 years.' In the following year Thom executed a deed, proceeding on the narrative of the tack, and that he was resolved to exercise the power thereby committed to him of naming a person to enjoy the liferent of the tack after the expiry of the 38 years, and containing a nomination in these terms:—'I do hereby nominate and appoint 'the heir-male procreated of my own body, and existing at the 'expiration of the said 38 years, whom failing, I do name and 'appoint my eldest daughter then in life; and failing daughters 'procreated of my own body, and existing at the expiration of the 'foresaid space, I do name and appoint the heir-male of the body 'of my eldest daughter then in life, whom failing,' &c., going on with certain further appointments. It did not appear from the record when Thom died, but he never had any heir-male of his body; and on the expiration of the 38 years at Whitsunday 1826, Margaret Thom (who had married a person named Fiddes) was his eldest daughter in existence. In the March preceding, the landlord raised a summons of removing, on which a new deed of nomination, appointing Margaret Thom by name, in case the appointment by her father should not be sustained, was executed by the survivor of certain trustees to whom Thom had, by a trust-

deed of settlement, dated in 1798, conveyed the tack along with his other property, for certain purposes therein mentioned, but not containing any power of nomination; and declaring that the trust-deed should not be construed to revoke the previous nomination. It was then pleaded in defence against the action of removing,

1. That the description by Thom of his eldest daughter in existence at the expiry of the 38 years was a sufficient 'condescending' on the person who was to enjoy the liferent tack to constitute a valid exercise of the power in the lease, the more especially as there never existed an heir-male of his body to whom it could be said she had succeeded as a substitute; and in regard to the further nominations after her, even if they were invalid, that could not affect her nomination, which was sufficient, being in reality the first effectual nomination; and,

2. That the tack being granted to 'assignees,' the assignation in Thom's trust-deed of settlement carried to his trustees the whole rights under the tack, and, inter alia, the right to condescend on the person who should enjoy a liferent after the expiry of the 38 years; and the surviving trustee having executed a nomination of Margaret Thom within the period allowed in the lease, that she was entitled to the liferent in virtue thereof, even if her father's nomination of her should not be sustained.

To this it was answered,

1. That the clause in the lease merely gave a power to specify an individual on the contingency of whose life the tack should continue effectual after the expiration of the 38 years, but not to appoint a series of substitutes, the existence of any one of whom at the expiry of the 38 years would secure a liferent in addition; —that it was incompetent also to nominate a person by description, or otherwise than by naming the individual; and that even if it were competent to do so, the nomination had fallen by the failure of the person first described, viz. the heir-male of the lessee; and,

2. That the trust-deed contained no power to the trustees to nominate, and indeed excluded it, as it declared that it should not be construed to revoke the previous deed of nomination; but, besides that, the power to nominate was clearly, by the terms of the tack, limited to John Thom personally and individually.

The Sheriff having assoilzied, on the ground, as stated in a note, that 'the eldest daughter was sufficiently condescended on 'by the original tacksman in terms of the lease,' Irvine, the landlord, brought an advocation, in which the Lord Ordinary remitted simpliciter, and the Court unanimously adhered.

Lord Pitmilly.—I do not say that this case is not attended with difficulty, but on the whole I think the Sheriff's interlocutor is right,

and on the ground stated in his note. The case of Carnegie* quoted at the bar was totally different from this. I think that no advantage can be derived from the nomination by the trustees, who were appointed merely for the purposes set forth in the trust-deed, which excludes such a power in the trustees by the exception of the previous nomination, on which alone the respondent's right must stand. Now it is admitted, that after naming one person, Thom might have changed and named another, and I do not see that that would have been much different from what he has done, which I consider to have been a bonâ fide exercise of the power.

Lord Alloway.—I was a little puzzled at first, but my settled opinion does not differ substantially from that of Lord Pitmilly. Very difficult questions might have arisen, as to whether assignees or heirs could have named the person to have enjoyed the liferent, there being no clause prohibiting them, and every privilege in a lease being understood to be intended for the tenant in it; but the only question here necessary to be decided is, whether Thom has exercised the power given him in the lease? The nomination was made 27 years before the expiry of the fixed period; and supposing he had then no family, it was natural for him to name them in their order. But there never was an heir-male, so that the eldest daughter is in reality the first person called; and giving a fair bonâ fide construction to the lease, I think she has been sufficiently condescended on.

Lord Glenlee.—I am entirely of the same opinion. A landlord, in giving a lease of this kind, cannot be supposed to have calculated, in stipulating the terms of it, on the chance of an effectual nomination not being made. Supposing even that the word had been 'to name' instead of to 'condescend on,' Thom might surely have named any one of two persons who might be alive at the expiry of the 38 years. Instead of that, he names his son, if he has one then alive,—and then, in the event of his death, he names his daughter. He has therefore condescended on the person who is to take, and that is all which can be required.

Lord Justice-Clerk.—I have little to add to what has been said. I think, however, the power was personal to Thom; but giving to the lease the fair bonâ fide construction to which such contracts are entitled, I think he has sufficiently exercised the power, especially when I consider how similar processes have been dealt with, as that in regard to the Roxburghe estate and honours, where, under a power to nominate the heir, a nomination to the eldest daughter of Harry Lord Ker was held effectual to the fourth daughter, who came, by the death of the sisters, to be the eldest. It is of no consequence that here the heirs of the other daughters were added; no son having ever existed, the eldest daughter has been sufficiently condescended on.

P. Irvine, W. S.—J. Greig, W. S.—Agents.

* 1. Shaw's Appeal Cases, p. 114.

J. and W. MACFARLANE, Complainers.—*Jeffrey—G. Napier.* No. 273.
A. B. Respondent.—*D. of F. Moncreiff—Rutherfurd.*

Justice, Administration of—Clerk of Court—Title to Pursue—Expenses.—A Justice of Peace Depute-clerk for one of the districts of a county, who was also clerk to the road trustees of the same district, having in the latter capacity raised in his own name an action before the Justices of the Peace of his own district against two parties, accusing them of evasion of toll, and concluding for penalties, part of which was payable to himself; and having conducted the proceedings by his own clerk, who also officiated as clerk of Court, he himself not having attended personally, and one of the parties only having been cited, and decree pronounced against him—Held, in a petition and complaint presented by both of these parties, without the concourse of the public prosecutor,—1.—That the party not cited had no title to pursue, but that the other had;—2.—That the clerk had been guilty of malversation in office, and therefore suspended for one year, and found liable in expenses;—but,—3.—That these expenses were not to be taxed as between agent and client.

March 6. 1827.

2D DIVISION. F.

THE respondent was one of two joint clerks-depute to the Justices of Peace of a particular district of a county, and he was likewise clerk to the trustees of a road situated in the same district under a local act of Parliament, which provided that suits for recovery of penalties under the act might be brought in the name of the treasurer, collector, clerk, surveyor, tacksman of the tolls, or any one trustee. In consequence of an information that the complainers, James and William Macfarlane, had been guilty of an evasion of one of the tolls, the respondent, as clerk to the trustees, and by direction of one of their number, presented to the Justices of Peace of the district in which he was depute-clerk, a petition praying to have the statutory penalty for evasion of the toll (one half of which was payable to the prosecutor) inflicted on the Macfarlanes, and also to have them fined each in the sum of £5, as an indemnity to each of three persons, viz. the toll-keeper, his wife, and sister-in-law, whom they were stated to have assaulted and maltreated. Warrant of apprehension was obtained against both the parties, but it was only executed against William Macfarlane, who obtained his liberation by consigning £10 in terms of the general road act. Defences were thereafter given in for William, and a proof was allowed, and taken in presence of two Justices, one of whom was the maternal uncle of the toll-keeper. In the course of this proof, objections were taken by Macfarlane to the admissibility as witnesses of the toll-keeper, and the two members of his family, in whose favour there was a conclusion for a sum 'in indemnity' in the complaint; but this objection was repelled by the Justices, and they were allowed to be examined cum nota. During this procedure, the respondent did not attend the Court personally. One of the clerks of a firm of which he was a partner, however,

conducted the cause for the prosecution, and acted as clerk of Court in writing down the depositions of the witnesses, (but this was alleged to have been with concurrence of the agent for Macfarlane,) and also in writing out the several interlocutors, with the exception of the final judgment, which was written by one of the Justices. After the proof had been taken, the Justices submitted the process to the consideration of the principal clerk of the Justice of Peace Court, (who was also Sheriff-substitute of the county,) and received his opinion that an evasion of toll was proved, and that a mitigated penalty should be imposed on Macfarlane, with expenses. The Justices then fixed a day for pronouncing judgment, and directed the parties on both sides to attend. The respondent accordingly attended, as did also Macfarlane, along with an agent, who gave in a minute objecting to the legality of the process, in respect of the respondent being clerk of the Court in which he had brought and conducted his suit. The Justices disregarded this objection, and pronounced a judgment drawn out by one of themselves, whereby they found 'that William Macfar-'lane did attempt to evade the toll,' and fined him 'in the mitigated 'penalty of £2 sterling, besides £3 of expenses.' A petition and complaint was thereupon presented to the Court of Session by James and William Macfarlane, praying to have the respondent removed or suspended from his office, and found liable in such penalties as the Court should deem proper. This complaint having been remitted to the Lord Ordinary, his Lordship, after making up the record, reported the cause on Cases to the Court.

For the complainers it was pleaded,

1. That, in virtue of the act of sederunt of 6th March 1783, it was illegal for any one to conduct a cause as agent, either by himself or by confident persons, in a court in which he held the office of clerk;—that this rule could not be relaxed, more especially as in this case there was no necessity for bringing the action before the Justices of the particular district where the respondent officiated, it being competent to have brought the suit before the Sheriff or other Justices; or, as the complainers resided in another county, before the Justices or Sheriff of that county; and it being also competent to have brought the action in the name of the treasurer, or of any of the other persons entitled by the road act to sue for penalties.

2. That the respondent was guilty of malversation in office, in having acted in the process in question through the medium of his clerk as clerk of Court, and consequently assessor to the Justices; and,

3. That the malversation was aggravated by the injustice done

to the complainers in one of the Justices, who was uncle to the toll-keeper, being allowed to sit and judge in the cause, and by the toll-keeper and two other persons, in whose favour there were pecuniary conclusions in the petition, having been admitted as witnesses.

On the other hand, the respondent objected to the title of the complainers to follow out a complaint, concluding merely for penalties, without the concourse of the public prosecutor, and to that of James Macfarlane in particular, as the petition never had been executed against him, and no proceedings had taken place in regard to him; and on the merits he pleaded in answer,

1. That the respondent, in raising the prosecution, was strictly performing his duty under the local road act; and as he conducted the cause as a party, he was not contravening the act of sederunt, which relates only to persons acting as agents; and that this applied more especially in matters under the road acts, in which the Justices are in use to act without the intervention of a clerk.

2. That he could not be guilty of malversation, unless he had personally acted as clerk of Court in his own action, which was not the case, having abstained from officiating in any stage of the process.

3. That if any iniquity had been done by the Justices, the respondent could not be responsible for it; but that, in point of fact, the conclusions for behoof of the toll-keeper and his family had never been insisted in, so that there was in reality no valid objection to their being admitted as witnesses, or to the uncle sitting as a Justice.

After the cause had been delayed for some time, in order to determine what sentence should be pronounced, it was now put out, when the Lord Justice-Clerk observed:—'After maturely re-'considering this case, I am still of opinion that it is necessary 'to mark authoritatively the opinion of the Court. The respond-'ent here acted, I have no doubt, from error in judgment, and 'without any wrong intention; but we must look to the conse-'quences of his having unnecessarily brought the case before 'that particular district of Justices where he was clerk, the more 'especially as the road act under which he acted provides several 'different prosecutors, which made it quite unnecessary for him 'to prosecute at all; and, under all the circumstances, I have to 'propose to your Lordships the following interlocutor:—

"The Lords having resumed consideration of this petition and "complaint, with the answers thereto, and Cases ordered by the "Lord Ordinary, and heard counsel thereon, repel the objections "to the title of the complainer William Macfarlane to insist in "the said complaint; but in respect that the original complaint

" was not served upon James Macfarlane, nor any procedure " held therein with regard to him, find that he has not quali- " fied a sufficient title and interest to support its conclusions:— " Find that the respondent, in respect of his having, as district " clerk of the road trustees of ————shire, instituted a com- " plaint, concluding not only for the statutory penalty, on account " of an alleged evasion of the toll of ————, (the half of which " penalty was by the statute declared to be payable to himself,) " but also for certain other sums as indemnification to James " Ruchead the toll-keeper, his wife and sister-in-law, who after- " wards were admitted as witnesses for the complainer cum nota " in that very process, although no dismissal of the complaint " quoad them appears to have been entered on the record, and in " respect of his having unnecessarily brought the said complaint " before the Justices of the Peace of the ———— district of the " county of ————, in which Court the said respondent then " held the office of clerk by deputation from the principal clerk of " that county, and that part of the proceedings upon this complaint, " and various parts of the proof led in support thereof, appear to " have been conducted and written by the clerk of a copartnery, " of which the respondent was then a member, and during which " proof, it also appears that a maternal uncle of the said James " Ruchead actually sat as one of the Justices of the Peace,—did " act contrary to law, and in a manner subversive of the impar- " tial administration of justice. And the Lords therefore sus- " pend the respondent from his office of depute-clerk of the peace " of the said county for the space of twelve calendar months " from and after the first day of April next, and prohibit and " discharge him from either, directly or indirectly, exercising any " of the duties, or drawing any part of the emoluments of the " said office during the foresaid period:—Find him liable in the " expenses of this complaint, allow an account thereof to be given " in, remit the same when lodged to the auditor of Court to tax " and report, and decern."

The other Judges concurring with his Lordship, judgment was pronounced accordingly, and the interlocutor ordered to be inserted in the books of sederunt.

A motion was then made on the part of the complainers to have the expenses audited as between agent and client; but this their Lordships refused.

Complainers' Authorities.—A. S. March 6. 1783; Sievewright, Feb. 4. 1786, (A.S.); Sellar and Thomson, Feb. 11. 1809, (F. C.); Campbell, July 10. 1824, (ante, Vol. III. No. 187); Adam, July 5. 1824, (Justiciary Reports, p. 119); M'Millan, Dec. 10. 1825, (ante, Vol. IV. No. 216); Easton, (ibid. 217.)

Respondent's Authorities as to Title.—Darby, Feb. 10. 1786, (F. C.); M'Intosh, March 9. 1809, (F. C.) affirmed in House of Lords, Mar. 9. 1812, (1. Blyth, 272); Murray, Dec. 15. 1824, (ante, Vol. III. No. 200.)

G. and W. NAPIER, W. S.—MACMILLAN and GRANT, W. S.—Agents.

A. MACCALLUM, Suspender.—*Fullerton.* No. 274.
J. SPEARS, Charger.—*Skene.*

Road Act—Stat. 4. Geo. IV. c. 19.—Held that an exemption from payment of toll in a local road act, was not derogated from or repealed by a general exemption of a more limited nature, but which was not inconsistent with the exemption in the local act being introduced into the subsequent general road act.

March 8. 1827.

1ST DIVISION. Lord Eldin. D.

BY the road act for the county of Edinburgh, (49th Geo. III. c. 37,) it is enacted, 'That no toll shall be demanded or taken 'for or in respect of carriages, horses, or cattle, employed in 'carrying stones or other materials,' &c. 'or carrying hay, grain, 'or pulse in the straw, potatoes, turnips, or other vegetables, 'flax, hemp or wool, to be laid up in the houses, outhouses, barns, 'or yards of any heritor, tenant, or inhabitant of the said county, 'by whom the same were raised, and not being for sale; or dung 'or other manure for the improving and manuring of land, not 'bought, sold, or disposed of, or carried for the purpose of being 'sold or disposed of, but passing to be laid up or placed in the 'outhouses or onsteads, or on the lands of the owner thereof, who 'shall not have bought the same.'

The suspender Maccallum, who was the tenant of the farm of Plewlands near Edinburgh, and who occupied premises in the Grassmarket of that city as a cowfeeder and dealer in milk, was in the practice of bringing from his farm to his cowhouse agricultural produce, such as hay, grass, turnips, for the use of his cows, and of carrying out the manure to his farm. In 1814 a question having arisen between him and the tacksman of the Wright's-houses toll-bar, (through which it was necessary to pass in going to and from his farm,) whether he was liable to pay toll on his horses and carts engaged in transporting the produce and manure, the trustees found he was entitled to be exempted.

By the general turnpike act for Scotland, (4th Geo. IV. c. 19, § 2,) it is declared, 'Whereas it is of great importance that one 'uniform system should be adhered to in the laws for regulating 'the management and maintenance of turnpike roads through-'out that part of Great Britain called Scotland, be it therefore 'enacted, That from and after the passing of this act, all the 'enactments, provisions, matters, and things in this act contained, 'shall extend to all acts of Parliament now in force, and to all

'acts of Parliament which shall hereafter be passed, for making, 'widening, turning, amending, repairing, or maintaining any 'turnpike road in that part of Britain called Scotland, (save and 'except as to such enactments, provisions, matters, and things 'as shall be expressly varied, altered, or repealed by any such 'act as shall be hereafter passed.')

And by the 36th section it is enacted, 'That no toll shall be 'demanded or taken at any toll-bar from any person for any 'horse, or other beast of draught or carriage, employed in carry-'ing or conveying, having been employed only in carrying or 'conveying on the same day, on the turnpike road on which such 'gate is placed, any ploughs, harrows, or other implements of 'husbandry, (unless laden also with some other thing not here-'by exempted from toll,) or any hay, straw, or dung, fodder 'for cattle, and corn in the straw, or other produce of such farm, 'from one part of any farm to another.'

A question then arose, whether the exemption conferred by the local statute was not taken away by the general act, so that Maccallum was thenceforth liable in toll. In order to have this question tried, Maccallum brought a suspension, and contended, That although it was true that where there was an absolute inconsistency between the respective provisions of the two statutes, it must be held that those in the local and prior one were repealed by those in the subsequent and general one; yet as there was here no repugnancy between the existence of the exemption in the local statute, and that in the general statute, and as there was no express repeal, the original exemption must be held still to exist; and that although the exemption in the general statute may have been superfluous with reference to the county of Edinburgh, (seeing that a more extensive exemption already existed,) yet this could not imply a repeal or restriction of that exemption.

To this it was answered, That it was a general rule, that posterior statutes are held to derogate from and repeal those previously enacted and relating to the same subject, except in so far as these prior statutes are expressly saved from that effect; that the general road act was intended to form one uniform rule throughout Scotland, and thereby to supersede all the provisions and exemptions of prior local statutes; that in particular it was enacted, in reference to the transporting of agricultural produce and manure, that there should be only an exemption in passing from one part of a farm to another, whereas Maccallum claimed a more extensive exemption, which was not only not sanctioned by the statute, but was inconsistent with it; and being so, it must be held, according to his own principle, to have been derogated from and repealed.

The Court, on the report of the Lord Ordinary, unanimously suspended the letters.

LORD BALGRAY.—It was not the intention of the general act to alter specific provisions in local statutes. In consequence of the great variety of existing statutes relative to the King's highway, it was found extremely difficult to carry them into execution, and a committee of Scottish and English gentlemen was appointed to endeavour to introduce a uniform system; but the chief object was to avoid the very great expense of obtaining local acts. With that view, every thing was introduced into the general statute which was usually found in local acts, so that when it should be necessary to procure a new local act, it might be obtained at much less expense than formerly. But it was certainly never intended to alter the specific provisions already existing in the prior local acts. In order to repeal such provisions, there must be in the general act an enactment to that effect; and more especially where an indemnity has been given, there must either be a repeal of it, or an enactment so inconsistent with it as to amount to a repeal. But that is not the case here, and therefore I think that this party is entitled to the benefit of the exemption in the local act.

The other Judges concurred.

Suspender's Authority.—Baillie, July 11. 1826, (ante, Vol. IV. No. 507.)

HOTCHKIS and MEIKLEJOHN, W. S.—J. BALFOUR, W. S.—Agents.

ANDERSON, CHILD, and CHILD, Petitioners.—*Greenshields.* No. 275.

Public Records—Transmission of Processes.—Warrant refused for transmitting an extracted process, to be produced in one depending, in respect of the facility of obtaining certified excerpts.

March 8. 1827.

2D DIVISION. F.

A petition at the instance of Messrs. Anderson, Child, and Child, praying for a warrant on the Lord Clerk Register and his deputies to transmit a process, the decree in which had been extracted, in order to be produced in one presently depending in this Court, having been moved,

Mr. Thomson, Clerk Register Depute, appeared at the Bar, and stated, that, in consequence of a regulation lately established, all extracted processes were carefully preserved; but that it would scarcely be possible to do this effectually, if they were allowed to be transmitted to pending processes, where parts of them might be lost, and from which there were no means of forcing them back; and he further stated that it was quite unnecessary, as parties might have constant access to them, and obtain extracts or certified copies of such parts as they wished to produce in other pro-

cesses. The petitioners then stated that they would have been perfectly satisfied with excerpts of parts of the papers, but that they had supposed that it would be necessary to take an extract of the whole process. The Clerk Register Depute, however, having stated, that although an 'extract,' properly speaking, was of the whole process, yet that certified excerpts of any sort could always be obtained, the Court, in respect of the facility of obtaining certified excerpts, refused the petition.

The Court were agreed that the practice of transmitting processes ought no longer to be allowed, wherever excerpts would answer the purpose.

W. PATRICK, W. S. Agent.

No. 276. D. CHALMERS, Petitioner.—*Cowan.*
W. OGILVIE, Respondent.—*A. M'Neill.*

March 8. 1827. 2D DIVISION. M'K.

INHIBITION recalled in part of consent, and quoad ultra on caution.

C. HOWDEN, W. S. Agent.

No. 277. H. GORDON, Petitioner.—*D. of F. Moncreiff—Gordon—Lumsden.*
Mrs. JANE DUNCAN, Respondent.—*Jeffrey—Rutherfurd.*

Inhibition, Recall of.—Court refused to recall, without caution, inhibition used against the proprietor of an entailed estate, on the dependence of an action containing alternative conclusions of declarator of marriage, or of damages for seduction.

March 8. 1827. 2D DIVISION. F.

MRS. JANE DUNCAN having raised an action against Gordon before the Commissaries, containing alternative conclusions of declarator of marriage, or of damages for seduction, (laid at £5000) executed inhibition on the dependence, and used arrestments in the hands of Gordon's tenants. The arrestments were loosed by Gordon on caution to the extent of £1000, and he then applied to have the inhibition recalled without caution, on the grounds,

1. That all his property was strictly entailed, and was thus secured from alienation.

2. That the conclusion for declarator of marriage was of a nature which could not be secured by inhibition, and that the conclusion for damages could not be insisted in, till the declarator of marriage was finally discussed, which brought the case to the

principle adopted in the Bargany cause, (Hamilton *v.* Fullerton, March 4. 1823); and,

3. That caution to the extent of £1000 had been already found in loosing the arrestments.

To this it was answered,

1. That a strict entail did not prevent the granting of heritable securities for the liferent of the heir in possession.

2. That, even in reference to the declarator of marriage, the respondent's interests might be materially affected by the acts of the petitioner as to his heritable property, but that the conclusion for damages was competently brought, and was a sufficient ground for maintaining the inhibition, unless caution were found; and,

3. That the caution found in loosing the arrestments could only be available to the extent of the rents which may have been in the tenant's hands, the amount of which was quite uncertain; and at all events that it did not afford security corresponding to the extent of the damages which would necessarily be awarded in the circumstances of the case, should the respondent succeed in that conclusion of her libel.

The Court recalled the inhibition, but only on caution for £1500, in addition to that found in loosing the arrestments.

LORD JUSTICE-CLERK.—In this stage we cannot take for granted what the result of the action may be. It is, however, a depending process with competent conclusions; and though the petitioner's estates are entailed, great injury might be done in regard to his liferent interest, and I do not think that we can recall the inhibition without caution. I should think that in the circumstances the caution ought to be for £1500, in addition to that found in loosing the arrestments. The Bargany case was very different, and does not rule the present.

The other Judges concurred.

Petitioner's Authorities.—Duncan, Jan. 22. 1822, (ante, Vol. I. No. 296); Turnbull, July 8. 1823, (ante, Vol. II. No. 443); Hamilton, March 4. 1823, (ante, Vol. II. Nos. 241, 242); Earl of Stair, Dec. 21. 1822, (ante, Vol. II. Nos. 105, 106.)

Respondent's Authority.—Nairne, Feb. 15. 1810, (F. C.)

J. LYON,—FINLAYSON and BREMNER, W. S.—Agents.

No. 278. J. BAIKIE and Others, Suspenders.—*Skene—Matheson.*
Rev. W. LOGIE, Charger.—*Sir J. Connell—Marshall.*

Manse.—Circumstances in which the minister of a royal burgh, with a considerable extent of landward parish, was found entitled to a manse;—and Observed, that he would have been so entitled under the act 1663, independently of special circumstances.

March 8. 1827.
2D DIVISION.
Ld. Mackenzie.
M'K.

THE parish of Kirkwall and St. Ola consists of the burgh of Kirkwall, with a considerable extent of parish to landward. It had been formerly the seat of a cathedral, and part of the old cathedral still forms the parish church. At some former period there had been a manse for the parson or vicar of the parish, which was frequently mentioned in the records of the presbytery of Orkney as one to which the minister had right, and he did possess a glebe in the parish. There also appeared on the records of the presbytery a designation in 1639 of a house adjoining the Bishop's palace (which had been possessed by the then incumbent's immediate predecessors) 'to be a perpetual manse, according to the laws of the kingdom, and custom of the church.' This manse had apparently been allowed to become ruinous, for the minutes of the kirk-session in 1672 and 1689 contain entries showing that the minister then received a certain sum yearly for house-mails out of the kirk treasury. Shortly after the Revolution, however, an application was made to the presbytery, who, on the 5th of July 1699, appointed tradesmen 'to inspect the 'manse,' and next day convened the heritors of the parish along with the magistrates of the burgh and the elders, before whom the tradesmen were sworn to make a true report. A report was accordingly given in, but no further procedure appeared on the records of the presbytery, which were incomplete,—a volume extending from 1701 to 1716 having been lost. In 1748, Mr. Edward Irvine, the then incumbent, presented a petition to the presbytery, stating that the manse, offices, &c., lying on the south end of the old palace, were ruinous, and praying the presbytery to take the usual steps, in order to have them repaired. The heritors were called as parties to this application; but some opposition having been made by them, Lord Morton, then the King's Donatory in the Earldom of Orkney, presented £1000 Scots to the magistrates of Kirkwall 'for building a manse to 'the minister of Kirkwall.' The opposition was then withdrawn; and the presbytery, having led a proof to establish that the ruinous house asked to be rebuilt was the old manse belonging to the minister of the parish, thereupon designed that

place as a manse, and the manse was built there accordingly. In 1793, an application having been made extrajudicially to the heritors to repair the manse, a meeting was held, when they agreed 'that £80 should be immediately furnished by the town and 'parish, and laid out in repairing the manse.' Of this sum the Magistrates of Kirkwall agreed to contribute £30, being a sum of vacant stipend of which they had the disposal; and the meeting then resolved that the remaining £50 'should be immediate-'ly levied and paid into the hands of the provost, and that he 'should immediately employ workmen, and carry on the ne-'cessary repairs of the manse;' but being of opinion that this sum 'should be levied by a general subscription of the heritors 'and inhabitants of the burgh of Kirkwall and parish of St. Ola,' they resolved that a subscription-paper should be sent round for that purpose. This was accordingly done; the money was collected, and the manse repaired; but having again fallen into great disrepair, and being extremely deficient in accommodation, the present charger Mr. Logie, in 1825, shortly after his induction, presented an application to the presbytery, praying for an inspection, &c. After the usual procedure, the presbytery condemned the old manse, approved of plans and estimates for building a new one, and decerned for the necessary amount (about £700) against the several heritors, conform to their valued rents; but, in respect of there being lands in the burgh and to landward not valued, reserving 'to the above heritors and their 'foresaids such relief from the feuars, proprietors, or corporation 'of the burgh of Kirkwall, or from the proprietors of land not 'in the valuation, as they may find competent, and legally exi-'gible by them.'

Baikie and other heritors then brought a suspension, on the grounds, inter alia,

1. That the minister of a royal burgh, though the parish was partly landward, was not entitled to a manse under the act 1663, c. 21, agreeably to the decision in the case of Auld *v.* the Magistrates of Ayr.

2. That the special circumstances in the case were not such as to warrant the decree for a manse, even if the presbytery had jurisdiction to decern for a manse in respect of specialties; but that it had been found in the same case of Auld that presbyteries have no power to design manses, except under the act 1663.

For the minister, in addition to a personal objection to certain of the suspenders, it was contended,

1. That, on the general point, the case of Auld was rather in favour of the right of the minister of a burgh, with an attached

landward parish, to a manse, independent of specialties, as, with the exception of the three Judges who formed the majority in this Division at giving judgment, the whole Court were of opinion that the minister was entitled to a manse under the act 1663; and,

2. That the various circumstances in this case, and particularly the church being a cathedral church—there being a glebe—there having formerly been a manse—there having been a designation by the presbytery in 1639, and again in 1743, and the manse having been repaired by the heritors in 1793, were of themselves sufficient to entitle him to a manse, independent of the general question of his right under the act 1663;—and that the decision in the case of Auld, finding that the presbytery had no jurisdiction except under the statute, was very doubtful, because presbyteries had succeeded to the powers of the Bishop's Courts, which originally had jurisdiction as to manses, independent of statute law; but, besides, that the specialty of there having formerly been a manse brought the case within the act 1663, even if, on the general point, the Court should adhere to the decision in the case of Auld; and that the suspenders had prorogated the jurisdiction.

The Lord Ordinary having reported the cause on Cases, the Court found 'the charger entitled to have a manse repaired or 'rebuilt, under the authority of the presbytery;' and remitted to the Lord Ordinary to proceed further in the cause, as to his Lordship should seem just.

Their Lordships were equally clear in regard to the minister's right to a manse on the general point, as on the specialties; and Lord Alloway, who, as an heritor of the parish, had not given his opinion in the case of Auld, stated that he would have agreed with the consulted Judges, that, independently of all specialties, the minister there was entitled to a manse under the act 1663.

Suspenders' Authority.—Auld, June 16. 1825, (ante, Vol. IV. No. 81.)

Chargers' Authorities.—Anderston, Dec. 17. 1664, (5121); Fullerton, Dec. 17. 1769, (F. C.); Williamson, March 26. 1685, (5121); Dobie, March 5. 1802, (App. Manse, 3); Dunfermline, Nov. 19. 1815, (F. C.); Irvine, Feb. 25. 1809; Opinions of Judges in Auld, ut supra.

J. PHIN,—MURRAY and INGLIS, W. S.—Agents.

M. MALCOMSON and Others, Pursuers.—*D. of F. Moncreiff—Pyper.*
R. HEDDLE, Defender.—*Sol.-Gen. Hope—Murdoch.*

No. 279.

March 9. 1827.

1ST DIVISION. Lords Eldin and Medwyn. S.

THIS was a question of a special nature, relative to the right to certain udal lands in the island of Walls, Orkney, in which the Lord Ordinary assoilzied the defender; but the Court altered, and decerned in terms of the libel.

R. URQUHART,—A. DALLAS, W. S.—Agents.

A. WIGHT, Suspender.—*Cuninghame.*
ISABELLA DEWAR, Charger.—*More.*

No. 280.

Process—Summary Diligence.—A bill of suspension passed simpliciter of a charge given by a married woman without the concurrence of her husband.

March 9. 1827.

1ST DIVISION. Bill-Chamber. Lord Newton. H.

THE charger, who was a married woman, some years ago obtained a decree at her own instance, and without the concurrence of her husband, against Wight, notwithstanding a defence stated by him against the competency of such an action. Her husband afterwards died, but she married a second time, and diligence was then raised on the decree at her own instance alone. Against this a suspension was presented by Wight on various grounds, but particularly on the incompetency of the diligence.

To this it was answered,

1. That she carried on business on her own account, and that the jus mariti was excluded by her contract of marriage; and,

2. That the defence had been pleaded and repelled in the action.

The Lord Ordinary refused the bill, and observed in a note, that 'all the grounds of suspension appear to the Lord Ordinary 'to be sufficiently obviated in the answers, but that of the original 'action having been raised by the respondent, then a married 'woman, without the husband's concurrence. But as it appears 'that the objection was stated as a defence in that action, and 'repelled by the Sheriff, this judgment, so long as it stands un-'reduced, is a res judicata against the complainer, which renders 'it incompetent to entertain the objection in the present proceed-'ings.'

Wight having reclaimed, and contended that independent of the objection to the decree, still, as she had been married since obtaining it, the concurrence of her husband was necessary, even although his jus mariti had been excluded; and the Court, on that ground, unanimously altered, and passed the bill simpliciter.

N. W. ROBERTSON,—CAMPBELL and MACK, W. S.—Agents.

No. 281. A. GORDON, Complainer.—*Sol.-Gen. Hope—Fullerton—Keay.*
EARL of FIFE and Others, Respondents.—*Thomson—Robinson.*

Sasine—Freehold Qualification.—A party claiming to be enrolled as a freeholder, having founded on a charter from Geo. III. to A., and a disposition and assignation by A. to the claimant in liferent, and to A. and his heirs and assignees in fee; and having produced an instrument of sasine in which the only Sovereign named was Geo. IV., and in which it was stated that the attorney held a charter by which 'dict. S. D. N.' had conveyed the lands to A., and also a disposition and assignation by which A. had disponed the lands to the claimant in liferent, and to the heirs and assignees of A. in fee—Held that as there was satisfactory evidence on the face of the instrument to identify the charter and disposition there recited with those founded on, the blunders were not material, and that the claimant was entitled to be enrolled.

March 9. 1827.

1st DIVISION. Lord Meadowbank. S.

ALEXANDER GORDON claimed to be enrolled as a freeholder of the county of Banff at a meeting held on the 29th of June for the election of a representative, and in support of his claim he produced, 1st, A charter of resignation under the Great Seal in favour of Theodore Morison, Esq. dated 20th September 1814, and sealed the 7th March 1815; 2d, A disposition and assignation by which Mr. Morison disponed 'to and in favour of the 'said Alexander Gordon in liferent, for his liferent use allenarly, 'and to the said Theodore Morison himself, and his own heirs 'and assignees whomsoever in fee,' the lands contained in the charter, and assigned to him the unexecuted precept of sasine; and, 3dly, An instrument of sasine, dated the 7th, and recorded the 13th of May 1825. This instrument commenced in these terms:—'In Dei nomine, amen. Per hoc præsens publicum in-'strumentum cunctis pateat evidenter et sit notum, quod septimo 'die mensis Maij, anno Domini millesimo octingentesimo et vigesi-'mo quinto, regnique Serenissimi Domini Nostri Georgii Quarti, 'Dei gratiâ, Britanniarum Regis, fideique defensoris, anno sexto, 'in mei notarii publici et testium subscribentium præsentiâ per-'sonaliter comparuit Jacobus Barclay,' &c. as attorney; and after mentioning the appearance of the bailie, and that, in virtue of the clause of dispensation 'infra mentionat.,' the parties went to the place therein pointed out for taking sasine, the deed proceeded to recite that 'the attorney came on the ground, 'habens et in 'suis manibus tenens quandam cartam resignationis sub sigillo 'per Unionis tractatum custodiend., et in Scotia vice et loco 'Magni Sigilli ejusdem utend. ordinat. de data ut infra script. et 'præceptum sasinæ sub insertum in se continen.; per quam car-'tam dict. S. D. N. Rex, cum consensu Baronum sui Scaccarii in 'Scotia, dedit, concessit, et disposuit., ac pro se, suisque regiis suc-'cessoribus confirmavit, Theodoro Morison, armigero de Bognie,

'ejusque hæredibus et assignatis quibuscunque, hæreditarie et irre-
'dimabiliter, terras aliaque postea mentionat.,' &c. Then, after enumerating the lands, &c. the instrument proceeded thus:—'Ac
'etiam habens et in suis manibus tenens dict. Jacobus Barclay,
'procurator et actornatus antedict., quandam dispositionem et as-
'signationem de data septimo die Maii anno millesimo octingen-
'tesimo et vigesimo quinto, fact. et concess. per dict. Theodorum
'Morison, ad et in favorem dicti Alexandri Gordon, in vitali re-
'ditu, et sui ipsius in feodo, per quam dict. Theodorus Morison,
'propter causas inibi specificat., vendidit, alienavit, disposuit, ad
'et in favorem dicti Alexandri Gordon, in vitali reditu, pro vitali
'reditu usu solummodo, et hæredum assignatorumque quorum-
'cunque dict. Theodori Morison sui ipsius in feodo, hæreditarie
'et irredimabiliter, totas,' &c. It also bore that an assignation had been granted of the unexecuted precept in the charter, in order that by virtue 'dict. præcepti sasinæ dict. Alexander Gor-
'don in vitali reditu, et dict. Theodorus Morison ejusque prædict.
'in feodo, promptius infeodarentur,' &c.

The usual procedure was then narrated, and the precept of sasine contained in the charter was recited, specifying the dates, and it was then stated that the bailie gave sasine to Mr. Gordon in liferent, but not to the fiar. In addition to these titles, he also produced the requisite certificate of valuation.

Against this claim it was objected by the Earl of Fife,

'1. That the terms of the instrument of sasine in his favour
'are not consistent with those of the disposition and assignation
'granted to him by Theodore Morison, Esq. of Bognie, which
'he has produced with his claim. By the disposition and assig-
'nation produced, Mr. Morison conveys the lands upon which
'Mr. Gordon claims to be enrolled, to and in favour of the
'said Alexander Gordon in liferent for his liferent use only,
'and to the said Theodore Morison, himself, and his own heirs
'and assignees whomsoever, in fee. But by the disposition and
'assignation, as it is recited in the instrument of sasine, Mr.
'Morison is said to have conveyed the lands 'ad et in favorem
"dicti Alexandri Gordon in vitali reditu, pro vitali reditu usu
"solummodo, et hæredum assignatorumque quorumcunque dict.
"Theodori Morison sui ipsius in feodo;'—that is, 'to and in
"favour of the said Alexander Gordon in liferent for his liferent
"use only, and the heirs and assignees whomsoever of the said
"Theodore Morison himself in fee,'—in place of, 'to the said
"Theodore Morison himself, and his heirs and assignees whom-
"soever, in fee.'

'The instrument of sasine being thus disconform to the dis-

'position and assignation produced, as one of its essential war-
'rants, it is clear either that the disposition and assignation has
'not been correctly deduced in the instrument of sasine, or that
'sasine has been taken upon a different disposition and assigna-
'tion from that now founded on; and, in either case, the claimant
'has not produced a sufficient title upon which he can claim to
'be enrolled; and,

'2. That the instrument of sasine produced proceeds upon a
'charter granted by and in the reign of his Majesty King George
'the Fourth; whereas the charter produced is granted by and
'in the reign of his late Majesty King George the Third. The
'instrument of sasine being thus disconform to the charter pro-
'duced, as one of its essential warrants, there is no sufficient title
'upon which the claimant can claim to be enrolled.'

There was also an objection of nominal and fictitious, but that was not insisted in.

To this it was answered,

'1. That the conveyance in the claimant's favour is described
'with sufficient accuracy in the instrument of sasine. It is de-
'scribed by its date, and as conveying the lands specified in the
'claim. It is described as having been granted 'ad et in favorem
"dicti Alexandri Gordon in vitali reditu, et sui ipsius in feodo,'—
'that is, of Theodore Morison himself. It is further described as
'having been granted for the purpose of infefting the said Alex-
'ander Gordon in liferent, 'et dict. Theodori Morison ejusque
"prædicti in feodo.' In these circumstances, the omission of the
'word 'Theodori Morison' in one particular passage is quite
'immaterial.'

'2. That the second objection proceeds upon a misconstruc-
'tion of the instrument. There is no violation of the rules of
'grammar in holding that the word dict. applies to the word
'quam chartam, in which case the sentence must be read thus:
'By which said charter Our Sovereign Lord,' &c.

'But, even on the supposition that the word was written dic-
'tus, so as to apply exclusively to S. D. N. Rex, still it is not an
'error in substantialibus, because the charter is otherwise suffi-
'ciently described for the purpose of identification. It is de-
'scribed by its date, by the date of sealing, and as conveying cer-
'tain lands by name. It is further described as containing 'the
"precept of sasine after insert,' which precept is fully engrossed
'in the instrument.

'The date and other particulars thus distinctly set forth de-
'monstrate that the statement of its being granted by the pre-

'sent King, even if it contained such a statement, must be a cleri-'cal error.'

A majority of the freeholders having sustained the above objection, Mr. Gordon presented a petition and complaint, which, after having been remitted to the Lord Ordinary for preparation, and having been thereafter reported, and the Court having been equally divided in opinion, a hearing in presence was appointed before the whole Judges; on advising which, their Lordships, by a majority, repelled the objections, and found that he ought to have been admitted upon the roll of freeholders of the county of Banff, and granted warrant accordingly; but found no expenses due.

LORD JUSTICE-CLERK.—I admit that this is a question of difficulty, and have made up my opinion with much hesitation. In judging of the case, I consider that we are bound to regard it as if it involved a patrimonial question arising out of the feudal institutions—as if the parties were contending here for a substantial estate, and not merely as to an enrolment in the present state of the titles. I also admit that much weight is due to the circumstance, that the objections are here pointed against a public instrument; and that there is a distinction between an instrument of that nature and a private deed. In the latter case, our duty is to ascertain and carry into effect the will of the granter; and therefore more indulgence may be there given as to irregularities, than to those occurring in an important public instrument. The greater number of the decisions which have been quoted, have reference to private deeds, and not to such instruments. Having made these preliminary observations, I shall now proceed to the objections, which are two in number; and in doing so, I shall first consider the second objection.

1. That objection is, that the notary, in reciting the titles of the liferenter and fiar, has made a blunder in describing them. We must, however, always keep in view that this sasine is founded on, not by the fiar, nor to show that he has a feudal estate, but exclusively by the liferenter; and the question therefore comes to be, whether this sasine is good in favour of the liferenter? By the statute 1693, c. 35, it is ordered that titles shall be deduced, 'otherwise to be void and 'null.' If, therefore, they be not deduced in due form, the consequence is pointed out to us in clear language; and I wish extremely that the same plain rule had been laid down to us with regard to every deviation from established form of sasines, and that a particular one had been given, which, if neglected, would have inferred nullity. But no such form has been prescribed, and no such penalty has been enacted; and therefore the question I have to ask myself, after perusing this sasine, is, In whose favour is it taken; and is there on the face of it such a deduction, and such a description of the titles

of the party claiming, as we ought to sustain? Now the party claiming, it will be always recollected, is the liferenter; and there is no pretence that, so far as *he* is concerned, any error has been committed. The only error which is said to exist, relates to Theodore Morison. In describing the assignation, the notary states it to have been granted to the complainer in liferent, and to the heirs and assignees of Theodore Morison in fee; whereas the assignation produced bears to be to Theodore Morison, and his heirs and assignees, in fee. But in the subsequent part of the instrument a correct statement of the title is given. It is there said to be a disposition in favour of the complainer in liferent, and Mr. Morison in fee; so that it is impossible to entertain the shadow of a doubt, that the deed described is the one founded on. But supposing this should be regarded as a blunder, I apprehend that it can be of no avail against the liferenter. In the case of Fisher, it was decided that where the liferenter alone was claiming, it was not necessary to refer to the far at all; and in that of Waldie, that in deducing the titles it was not requisite to recite the whole contents of the precept, but only that part of it which was necessary and material for the party taking infeftment. Therefore, as the liferenter's right is here set forth unexceptionably, I am of opinion that this objection is not well founded.

2. The next objection is rested on the alleged disconformity between the instrument of sasine and the charter. Now, with regard to the attempt which has been made to read the word dict. as dictam, so to make it agree with cartam, instead of dictus, and so refer to rex, I am perfectly clear that it cannot be listened to. It is plain from the whole style of this deed that it must refer to rex, and not to cartam. But although I am of that opinion, still I think we have sufficient evidence of what the charter was which the attorney had in his hands. It is true that the instrument begins with mentioning the year of the reign of George IV., and that it is then stated that the attorney appeared holding a certain charter of resignation in his hands, by which 'dict. S. D. N.' gave, &c. But, before you come to these words, reference is made to the clause of dispensation 'infra mentionat.;' and the instrument bears that the charter was of the date and sealing 'ut et infra script.,' and contained 'præceptum 'sasinæ sub insertum.' We are therefore bound to look to the subsequent part of the instrument in order to ascertain what that charter was; and we there see that it was a charter of the precise date, sealing, and nature, as the one founded on by the complainer. It is therefore demonstrable that it must have been a charter of George III.; and I cannot permit myself, in the face of all this evidence, to regard it as a charter of George IV., merely from the insertion of the word dict. Such being the case, it is impossible to hold that there may have been two charters,—one of George III. and another of George IV.—and that the attorney may have had the latter in his hands, because that is disproved by the date of the char-

ter and of the sealing. Indeed, after the course of decisions on this subject, (of all of which, however, I cannot approve,) it appears to me we cannot sustain this objection. In the case of Hamilton we were unanimously of opinion in the Second Division, that there was sufficient evidence on the face of the instrument to show what was the true date, although not specified; and we therefore sustained it. No doubt, it may be said that an improper degree of laxity has been introduced by these decisions, and perhaps the observation may be true; but I do not consider that we are entitled to retrace our steps, and enforce a rigid strictness, where we have not publicly intimated that we would do so. If any such notification had been given, I certainly would not be disposed to countenance any sort of looseness or irregularity. But here I do not think that there has been such an irregularity as to call upon us to declare this sasine null and void; and indeed the general rule is, that where the irregularity is not in essentialibus, the sasine is not null, but the notary is liable to be punished. In regard to the recording of sasines, the case is very different; because there are explicit statutes requiring the utmost accuracy, on pain of nullity. But we have no such statutes in relation to the sasine itself. I am therefore for repelling both objections, and sustaining the complaint.

Lord President.—I differ entirely from the opinion which has been delivered. In a general point of view, this is a case of very great importance; because, if we are to decide it on the principles which have been laid down, I apprehend that there will be an end to all form and regularity in public instruments. There is a great and marked distinction between private deeds and public instruments. In judging of the former, it is our duty to discover the will of the granter, and we must interpret the deed one way or another; but, in a public instrument of this nature, there is no will nor intention to be discovered. All that the notary has to do, is to certify what he heard, saw, and did; and if he certifies that which he did not hear, nor see, nor what was not done, we cannot inquire as to what he may have intended to certify. In considering this case, therefore, all the decisions as to irregularities in private deeds must be thrown aside, because they rest on a principle entirely different from that which is applicable here. This is the most solemn public instrument known in the law of Scotland. It begins by an invocation of the Deity—by calling on all and sundry to bear witness to the truth of the statement—and by specifying in the most formal manner the year of our Lord, and of the reign of the Sovereign. In this particular case that Sovereign is said to be George IV.; and then the notary certifies that the attorney came to the lands holding in his hands a certain charter. No mention whatever is made of any other Sovereign than George IV. But it is alleged that the charter was granted by George III., and not by George IV., and that the notary has made a blunder, which may be explained by other parts of the

deed; but such a blunder, I apprehend, is fatal. If a notary were to state in the name of God that the attorney held a charter granted by Charles Hope, Lord President of the Court of Session, whereas, in point of fact, it was granted not by him, but by David Boyle, Lord Justice-Clerk, would that not be a fatal objection? I apprehend it would, because the charters cannot be regarded as one and the same. Now, quomodo constat that there were not here two charters? The lands may have been resigned a second time, and a new charter may have been got from George IV.; and the conveyancer, in drawing the sasine, may have taken the description and precept from the old charter, and may have sent the new one to the country. I conceive, therefore, that this objection is quite fatal.

But there is another blunder. It is said by the notary that the attorney held in his hands a disposition and assignation in favour of the heirs and assignees of Theodore Morison in fee; whereas the deed founded on is not of that description, but is in favour of Theodore Morison himself in fee. Again, in other parts of the instrument, the disposition is described as being in favour of that person alone, and not of his heirs and assignees in fee; so that it is impossible to ascertain from this instrument what deed it was which the attorney held in his hands. It has been said that this part of the description is superfluous, and that, in giving sasine to a liferenter, it has been decided that it is not necessary to take notice of the fiar. I can easily understand that such a decision would be correct, if the recital and description were confined to the rights of the liferenter; but if, instead of doing so, it is set forth that the deed was in favour of one party in liferent and another in fee, and if it were not true that it was in favour of that party in fee, this would be a false and contradictory recital, and in my opinion give rise to a fatal objection. Such a case is very different from the one which has been argued upon.

Independent, however, of these observations, and supposing each of the blunders was not in essentialibus, I cannot go into the doctrine that we are to consider them separately, and as unconnected; on the contrary, I apprehend that we must take into consideration the circumstance of the *number* of blunders. If we pass over two blunders to-day, I do not see why we may not be required to pass over three to-morrow, and four the next day, and so on, till at last we must sustain any instrument, although it has twenty blunders in it, each of which, when considered by itself, is of little importance. But here there is blunder upon blunder.

With regard to the decisions, I apprehend that the general principle of law is, that strictness in regularity of form in deeds and instruments shall be enforced; and, therefore, wherever I find a case in which that rule has been relaxed, I would look upon it as an exception. On the authority of it, I would give my decision as to any other case precisely the same in all its circumstances; but if it were not so, I would not consider it as falling within the exception, but

within the general rule. Thus, for example, it was held in the case of Boyd, that where lands were described in the sasine as those of Earne, whereas those claimed on were those of Carne, the objection was not fatal, because it was regarded as a mere clerical error; and were such a case again to occur, I would bow to that decision. But I cannot see the principle of arguing from one blunder to support another; and that because in some cases we may have passed over some blunders, we must establish it as a general rule that all blunders are to be disregarded. On the contrary, I conceive that so long as public solemn instruments of this nature exist in the law of Scotland, we must enforce the utmost strictness; and that we can only admit of an exception in such cases as those I have already mentioned. I understand, however, that the majority of your Lordships are of a different opinion, for which I can only express my sorrow, as I think the principle involved in such a decision will be extremely dangerous.

The other Judges did not deliver their opinions, but the state of the vote stood thus:—

For repelling the objection, Lords Justice-Clerk, Glenlee, Balgray, Pitmilly, Cringletie, Meadowbank, and Newton.

For sustaining it, Lords President, Gillies, Alloway, Eldin, and Corehouse. *

Complainers' Authorities.—Don v. Waldie, Feb. 4. 1813, (F. C.); Fisher, July 7. 1824, (ante, Vol. III. No. 166); Hamilton, Jan. 24. 1824, (ante, Vol. II. No. 611); Livingston, March 3. 1762, (15418, Aff.); Kirkham, May 21. 1822, (ante, Vol. I. No. 480); Henderson, March 8. 1776, (No. 2. App. Mem. of P.); Boyd, Feb. 23. 1822, (ante, Vol. I. No. 395.)

J. Gordon, W. S.—Inglis and Weir, W. S.—Agents.

J. Stewart, Suspender.—*Speirs.*
D. Cameron, Charger.—*Jeffrey—G. Napier.*

No. 282.

Process—Consignation.—Bill of suspension by a tenant of a charge by an assignee of the landlord for payment of rent, refused to be passed without caution, notwithstanding the tenant having raised a multiplepoinding as to the rent, in respect that he intended to resist any application for an order to consign in the multiplepoinding, on the ground of his having certain claims of retention and compensation against his landlord.

March 9. 1827.

2d Division. Bill-Chamber. Lord Newton. M'K.

Cameron obtained from Graham of Gartmore, in 1824, an assignation to the rents of part of his estates; but the rents were allowed to be paid to Graham till last August, when the assignation was intimated to the tenants, who were likewise required to pay to another party holding an heritable bond over the same

* A similar decision was pronounced on the same day in a complaint at the instance of John Gordon against the Earl of Fife.

lands, but subsequently intimated. A multiplepoinding was then raised in name of the tenants, and they being shortly thereafter charged by Cameron for payment of the rents fallen due at last Martinmas, a bill of suspension was presented by Stewart, one of the tenants, which was passed by the Lord Ordinary on 'caution or consignation.'

Stewart then reclaimed, and contended that the bill should be passed without caution, on the ground that, pending a multiplepoinding, the holder of the fund in medio could not be compelled to pay to one of the claimants; more especially as the suspender and the other tenants had large claims of compensation and retention arising out of their leases, equal in amount to the rent due.

To this it was answered, That the suspender and the other tenants maintained that, in consequence of these claims, they were not bound to consign the rents in the multiplepoinding, which rendered it necessary that the bill should not be passed without caution.

The Court required the suspender to state whether he was willing to consign in the multiplepoinding; and he having declined to consent to such consignation, their Lordships adhered to the Lord Ordinary's interlocutor.

G. DUNLOP, W.S.—G. and W. NAPIER, W.S.—Agents.

No. 283.

G. LITTLE, Suspender.—*Murray—Gillies.*

R. A. OSWALD and Others, Chargers.—*D. of F. Moncreiff—Maitland.*

March 9. 1827.

2D DIVISION. Ld. Mackenzie. M'K.

Interdict—Salmon-Fishing.—IN a process of suspension and interdict brought by Little against Oswald and others to prevent their fishing with stake-nets, &c. on the allegation that their fishings were within the river Nith, and not in the Solway, which was conjoined with a previous process brought in 1816, but allowed to fall asleep, the Lord Ordinary recalled an interdict which had been granted in that previous process, but not enforced; and the Court adhered, under condition that Oswald &c. should keep an account of the salmon caught, and without prejudice to any new application for an interdict.

W. MARTIN,—A. GOLDIE, W.S.—Agents.

G. Barbour, Advocator.—*Maitland.*
W. Stewart, Respondent.—*W. Bell.*

No. 284.

Process—Stat. 6. Geo. IV. c. 120—Record.—An Inferior Court having pronounced judgment without making up a record, a remit made to have this done.

March 9. 1827.

2d Division.
Ld. Cringletie.
F.

In a process of removing before the Steward of Kirkcudbright at the instance of Barbour against Stewart, the Steward, without ordering condescendences of their respective averments, or making up a record, ordered 'the parties to appear in Court to answer such questions as may be put by the one to the other respecting the points in controversy,' and thereupon examined Stewart, and at the same time took the deposition of M'Naught, his uncle, as a witness in causa. Having then pronounced an interlocutor assoilzieing Stewart, Barbour brought an advocation, in which the Lord Ordinary remitted 'to the Steward of Kirkcudbright with instructions to recall his interlocutors, and to 'prepare the record by receiving a condescendence and answers, 'with notes of pleas in law, in terms of the act of Parliament and 'act of Sederunt.'

Against this interlocutor Stewart reclaimed, and craved the Court to allow the record to be amended in this Court; but this their Lordships refused, the error being so great, and adhered to the Lord Ordinary's interlocutor.

A. Blair, W. S.—J. Gray, W. S.—Agents.

J. R. Innes, Esq. Complainer.—*Sol.-Gen. Hope—Fullerton—Keay.*
Earl of Fife, Respondent.—*Thomson—Robinson.*

No. 285.

Sasine—Erasure—Freehold Qualification.—Held in a question relative to a freehold qualification, that part of the name of one of the parcels of lands enumerated in the sasine founded on having been written in all the material parts on erasures, the sasine was 'null and void.'

Mar. 10. 1827.

1st Division.
Lord Meadowbank.
S.

By a Crown charter of resignation, dated the 2d, and sealed the 6th of June 1825, in favour of Mrs. Rose Innes, there were conveyed to her 'totas et integras terras dominicales et maneriei 'locum de Netherdale, molendinum et terras molendinarias ea-'rundem, cum multuris, sequelis, lie sucken et knaveships ad eas-'dem spectan., villam et terras de Husbandtown de Netherdale, 'Craignethertie, Chapeltown, Millhill, Windyedge, et Coble-'croft,' &c.; and which lands, it was stated, 'nunc sunt divisæ 'in duas portiones lie lots, consisten. cognitæ, et sub nominibus 'et descriptione sequen. appellatæ, viz. Portio prima de Wester

'Craignethertie, sicuti in præsenti per Joannem Walker possessa; 'Oldtown seu Husbandtown de Netherdale, et parte de Coble- 'house, per Alexandrum Roberts, Coblehouse et cymba ejusdem, 'per Joannem Courage, Harperhill et Broadgate, et parte de 'Oldtown de Netherdale, per Alexandrum Sim, Chapeltown, per 'Jacobum Irvine, North Millhill, per Gulielmum et Georgium 'Watts, Wittiefoot, per Jacobum Peters, et domo, &c. super 'Millhill, per Isabellam Thomson; et portio secunda earundum 'de prædio et molendino de Netherdale et Windyedge,' &c. A clause of dispensation was granted for taking infeftment at particular places pointed out.

On the 9th of June Mrs. Innes executed a disposition and assignation in favour of her son, the complainer, of 'all and whole 'those parts and portions of the lands and estate of Netherdale 'comprehended under the first lot thereof, consisting of and now 'known by the following names and descriptions, viz. the town 'and lands of Craignethertie, as presently possessed by John 'Walker,' &c.; and she also assigned to him the unexecuted precept of sasine in the charter, so far as related to these lands. In virtue of that precept, sasine was taken in his favour on the same day; and in the instrument it was stated, that by the disposition his mother had conveyed to him 'totas et integras illas partes 'prædictarum terrarum et hæreditatis de Netherdale comprehen- 'sas sub prima portione lie lot earundem, consistentes et nunc 'cognitas, et sub nominibus et descriptionibus sequentibus agen- 'tes; videlicet, Villam et terras de Wester Craignethertie, sicuti 'in præsenti per Joannem Walker possessam, villam et terras de 'Oldtown seu Husbandtown de Netherdale, et parte de Coble- 'house, per Andream Roberts, Coblehouse et cymbam ejusdem, 'per Joannem Courage,' &c.; and also that the bailie at one of the appointed places, 'virtute dictæ cartæ et præcepti sasinæ, 'et clausulæ dispensationis inibi content., et officii per idem sibi 'commissi, dedit, tradidit, pariterque deliveravit, statum et sasin- 'am hæreditariam, atque possessionem realem, actualem et cor- 'poralem, totarum et integrarum illarum partium et portionum 'de prædictis terris et hæreditate de Netherdale, componen. pri- 'mam portionem lie lot earundem, et consisten. ex particularibus 'villis et terris de Wester Craignethertie, Oldtown seu Husband- 'town de Netherdale, Coblehouse, et cymba ejusdem,' &c. The clause of dispensation was not engrossed in the sasine, but was held as repeated; and it appeared that the instrument was erased in all the material parts of it on which the word 'house,' forming part of that of 'Coblehouse,' was written. The valued rent of the lands so conveyed was £401:6:7$\frac{4}{12}$ Scots;

but without Coblehouse they did not afford a freehold qualification.

Founding on these titles, and a certificate of valuation, the complainer claimed to be enrolled as a freeholder of the county of Banff, at the meeting held on the 29th June 1826, for the election of a representative. Against this claim it was objected by Lord Fife, 'That among other lands on which the claimant demands enrolment, are 'the town and lands of Oldtown or Hus-"bandtown of Netherdale, and part of Coblehouse, (possessed) "by Andrew Roberts; Coblehouse, and boat thereof, by John "Courage;' but, from essential vitiations and erasures in the instrument of sasine produced, there is no legal evidence that sasine of the said lands of Coblehouse, or any part thereof, has ever been delivered to the claimant, or that he stands at this moment infeft therein. The objection equally strikes against the qualification of the claimant in point of extent of valuation, in as much as there is no evidence that, without the said lands of Coblehouse, he is possessed of £400 Scots of valuation. Further, that the sasine is in various particulars disconform to its warrants, and, inter alia, infeftment is given on the town and lands of Wester Craignethertie, whereas the disposition and assignation claimed on convey right to the town and lands of Craignethertie. There are other essential discrepancies, but it is needless at present to particularize them further, as the first of the objections above stated is necessarily fatal, no part of a title being more in substantialibus than the description of the subject.'

To which it was answered for the claimant, 'That the erasure or vitiation is not in substantialibus. There can be no dispute that sasine was given of all the lands contained in the conveyance. Further, the charter and the conveyance, and the instrument of sasine, comprehend generally all the lands contained in lot first of the estate of Netherdale, as ascertained by the decreet of division of the Commissioners of Supply, and therefore any enumeration of particulars was superfluous; while that decreet proves, at the same time, that the valuation of the lands contained in lot first exceeds £400 Scots. The charter in favour of Mrs. Rose Innes refers to a division of the valued rent of the estate of Netherdale, and it describes particularly certain lands as being comprehended under the first lot, and certain other lands as being comprehended in lot second; and the disposition by Mrs. Rose Innes, after conveying certain lands by name, gives to the claimant all the lands comprehended in lot first, under whatever other names the same may go, and the sasine is

'in exact conformity to that general description. Further, the 'lands of Craignethertie are sufficiently described, first, as being 'parts of the estate of Netherdale,—and, secondly, as being pos- 'sessed by John Walker.'

A majority of the freeholders having sustained the objection, Mr. Innes presented a petition and complaint, which, after being remitted for preparation to the Lord Ordinary, was reported by his Lordship; and the Court being of opinion that the whole case turned on the effect of the erasures, and that, from the state of the decisions, it was of importance to take the opinions of the whole Judges, they appointed a query to be laid before them in relation to that point; and on advising these opinions, their Lordships, 'in respect of the erasures in the instrument of sasine 'founded on by the complainer, found the same null and void,' dismissed the complaint, and found him liable in the statutory penalty, and full expenses of process.

LORDS JUSTICE-CLERK, GLENLEE, PITMILLY, ALLOWAY, MEADOWBANK, COREHOUSE, and NEWTON, delivered this opinion:—Having considered the Cases in the complaint of J. Rose Innes, Esq. and answers for the Earl of Fife, we are of opinion, in answer to the question submitted to us by the Lords of the First Division, that the erasures in the different passages of the sasine in favour of the complainer, as to the latter part of the word Coblehouse, vitiate the sasine, and render it null and void.

LORDS PRESIDENT, CRAIGIE, BALGRAY, and GILLIES, without delivering their opinions at length, concurred in the above.

LORD CRINGLETIE delivered this opinion:—I am humbly of opinion that the erasures in the sasine of the last part of the word 'Coble- '*house*,' viz. '*house*,' is of no importance, and does not injure the sasine.

It must be admitted, that an erasure of the paper or parchment on which parts of any deed or instrument are written is of no importance, provided it be proved by proper evidence what is the true word that ought to be on that erasure. Proper evidence may be of different descriptions. If the erasure be mentioned in the attesting clause of a deed, as having been done before execution—if the word written on the erasure be repeated in other parts of the deed, and written where there has been no erasure — if there be duplicates of the deed bearing relation to it, and having the same words written on no erasure, all these authenticate the truth of the word written on an erasure. Thus, take the instance of a bond for borrowed money. It begins with owning the receipt of money, and proceeds,—'which 'sum I oblige me to repay.' Suppose one of these sums to be erased, and the other not, the one without erasure would prove the authenticity of the other. Take a lease bearing to be subscribed and exe-

cuted in duplicates, the one referring to the other, a word or words written on an erasure in the one would be supported by the same words in the other, being written where there was no erasure.

Now, infeftment is investiture, and is not constituted by an instrument of sasine alone. Sasine is no more than a part of the investiture. By itself alone it is not the foundation of prescription, except in the case of consecutive sasines in favour of heirs by services or precepts of clare constat. To constitute a title for prescription, there must be charter and sasine thereon, both of which constitute the investiture or infeftment. Craig, (Lib. ii. Dig. 2. § 18,) after mentioning that both constitute investiture or infeftment, adds, 'Charta 'enim per se non videtur actus perfectus, cum ejus robur et effectus 'adhuc pendeat, donec sasina sequatur; neque sasina per se investi-'tura dici potest, cum neque modum tenendi, neque pro quibus ser-'vitiis (quæ in omni investitura necessaria exprimenda ante diximus) 'exprimat. Et licet hæc a notario aliquando inserantur, non tamen 'notario de his referenti credendum, nisi etiam charta adsit; ini-'quum enim esset alii quam domino qui disposuerat de conditioni-'bus investituræ credi.' The same must be applicable to the lands in the sasine.

The charter and sasine, therefore, bear reference to each other, and constitute one infeftment or investiture; and consequently, if there be any doubt or difficulty about any subject or condition in the sasine, reference must be had to the charter, which will entirely remove it. And if we look to the charter and disposition in this case, the difficulty will be removed, that Coblehouse is the subject thereby conveyed.

But it may be said, this may be true; but how do we ascertain that the notary gave sasine of Coblehouse? Some other word may have been inserted there when he executed the instrument. I answer no. That is not in reason to be presumed. 1st, The word Coblehouse occurs in that part of the sasine which describes the charter, also in the conveyance to Mr. Innes by his mother; and it is distinctly written in both places on parchment no way erased. 2d, The charter, of the identity of which there is no dispute, contains Coblehouse distinctly; and when we see sasine taken, it is, in my opinion, no more than reasonable to believe that the notary did attest that sasine was given of the intended subject; and this is put beyond doubt, when he adds, that sasine was given of the lands specified,—'cum pendiculis et pertinentiis earundem, supra et in 'dicta carta, et dispositione et assignatione magis particulariter speci-'ficatis et descriptis.' If he did not give sasine of Coblehouse, he did not give it in terms of the charter and disposition. Yet he asserts that he gave sasine in terms of these deeds. There is a direct reference to the charter, which he was entitled to make, and thereby renders it a part of the sasine.

I shall only further suppose that in the charter the word Coble-

house had been written on an erasure—and in that case the freeholders might, with equal justice, have stated that it did not thence appear whether the Crown had given Coblehouse or not; but I am of opinion that no such objection would have been competent to the freeholders, when neither the Crown nor any other person claimed the subject. For the same reason, I doubt their right to object to the sasine on an unquestionable charter. I think that there is a difference between private writings and public instruments; and it is, that the former must support themselves, whereas, in the latter, reference may be had to the record, and to the warrants of them. If the word Coblehouse had been written on an erasure in the charter, which had been objected to on that account, I think that it might be supported by the signature on which the charter passed, and the prior investiture; and in the same way I think that in this case the charter and sasine forming but one investiture, the former supports the latter.

LORD ELDIN subjoined to this opinion:—On considering the within, I do not find any objection to it.

Respondent's Authorities.—Balfour, 371; 1. Ross, 145; 4. Stair, 42. 19; 3. Ersk. 2. 20; Earl of Bute, July 17. 1712, (11545); Patullo, Nov. 27. 1671, (11538); 1. Bank. 11. 34.

J. MORRISON, W.S.—INGLIS and WEIR, W.S.—Agents.

No. 286. Mrs. KIRK and Others.—*Baird.*

Factor loco Tutoris.—Circumstances in which an interim factor loco tutoris was appointed to act during the currency of the usual intimation on the walls.

Mar. 10. 1827.
1ST DIVISION.
H.

DAVID RAMSAY, shipowner and coal-merchant in Perth, having died intestate, leaving a daughter Margaret, who was only nine years of age, without guardians, and possessed of considerable property, both of an heritable and moveable nature, requiring immediate superintendence, the nearest of kin on both sides applied to the Court for the appointment of Mr. John Matthew as factor loco tutoris, and praying that, in respect of the urgency of the case, he should be authorized to act as interim factor during the time necessary for the usual intimation on the walls. The Court ordered intimation, 'and in the mean time nominated and appointed the said John Matthew within mentioned to be factor loco tutoris ad interim to the said Margaret Ramsay, with the usual powers,' &c.

KER and DICKSON, W.S. Agents.

J. KIRKPATRICK, Pursuer.—*T. Grahame.* No. 287.
R. THRESHIE, Defender.—*Cockburn—Gillies.*

Cessio Bonorum.—Warrant granted, without caution, for liberation of a debtor incarcerated in a provincial jail, who had obtained judgment awarding the benefit of cessio, but whose oath could not be reported before the rising of the Court, in consequence of the roads being blocked up with snow.

Mar. 10. 1827.
2D DIVISION.
M'K.

ON the 8th of March the Court granted the benefit of cessio to the pursuer Kirkpatrick, after considerable opposition on the part of Threshie, as treasurer for the trustees of the Dumfries turnpike road, of one of whose tolls he had been tacksman; but in consequence of the roads between Edinburgh, and Dumfries where Kirkpatrick was incarcerated, being blocked up with snow, the report of his oath could not be obtained; and this being the last day of Session, a petition was presented in his name, setting forth this circumstance, that he was at present alimented under the Act of Grace, and that his family were supported by the parish, and praying warrant of liberation. The Court granted warrant accordingly, without requiring him to find caution to return to jail, as had been the practice, when it was competent to reclaim against a judgment granting the benefit of cessio.

W. MARTIN,—D. S. THRESHIE, W. S.—Agents.

G. SAUNDERS, Petitioner.—*Greenshields—Skene.* No. 288.
RENFREWSHIRE BANKING COMPANY, Respondents.—*D. of F. Moncreiff—Rutherfurd—A. Dunlop jun.*

Bankrupt—Stat. 54. Geo. III. c. 137.—Composition Contract.—A sequestrated bankrupt having been discharged on a composition by a judgment declaring him discharged 'upon' payment of the composition, and having been sequestrated a second time, when a part only of the composition had been paid—Held,—1.—That the discharge must be interpreted as if it had been in terms of the Bankrupt Statute, '*except* as to payment of the composition;'—and,—2.—That under the statute the debts of creditors under the first sequestration were extinguished except the composition, and did not revive by the failure to pay the composition, but could rank in the second only for the balance of the composition remaining unpaid.

Mar. 10. 1827.
2D DIVISION.
Lord Eldin.
M'K.

THE estates of Ronald M'Nicol, merchant in Glasgow, having been sequestrated in July 1819, he offered his creditors a composition of 6s. in the pound, payable by three instalments, for which he granted bond, along with four persons as cautioners. This composition was accepted by the creditors, and approved of by the Court, who pronounced an interlocutor thereupon, finding 'the said Ronald M'Nicol discharged of all debts contracted prior to

'the 17th of July last, *upon* payment of the composition, in terms 'of the bond.' M'Nicol was accordingly reinvested in his estate; but, after paying a part only of the composition, he was a second time sequestrated, all the cautioners for payment of the composition having also become bankrupt. In this second sequestration, the Renfrewshire Banking Company (who had been creditors under the former sequestration, and had only received payment of 2s. 3d. of the composition,) claimed to be ranked for their original debt, under deduction of the amount received as part of the composition. Saunders, the trustee, refused to allow the claim, and presented a petition to the Court, praying to have it found that the Bank was 'entitled to be ranked on the bankrupt 'estate only for the balance of the composition still due to them.'

This petition having been remitted to Lord Eldin, (then junior Lord Ordinary,) the Bank, in support of their claim, contended,

1. That the object of the Bankrupt Statute was to render the common extrajudicial composition contract imperative on the whole creditors, if consented to by a majority; and as such a contract had always been construed to be a conditional discharge, dependent on the performance by the bankrupt of his part of the obligation, in which if he failed, the original debt necessarily revived, so the same rule must apply to a composition contract under the statute.

2. That this is also the true construction of the words of the statute, which declares that, on approving of the composition, the Court shall pronounce an order declaring the bankrupt 'discharged, 'except as to payment of the composition,' which is in reality a condition of the discharge; or at all events it clearly means that, to the effect of enabling the creditor to obtain payment of the composition, the bankrupt is not discharged, so that it must always be competent to rank for the full debt, in order to draw at least the composition; and that the construction put on it by the trustee, viz. that all the debts are discharged, with the exception of the composition, would render the clause mere surplusage, as the general discharge of all debts prior to the sequestration could never include the composition, which not only is contracted after the sequestration, but is the substitute in consideration of which the discharge is granted, and so would not need to be excepted, if nothing more was meant than to declare that it should not be discharged; and,

3. That, in the present case, the act or order of the Court having merely discharged the bankrupt '*upon* payment of the 'composition,' agreeably to the form invariably followed since the passing of the statute, this discharge, which is purely condi-

tional, must be the law of the case, although it should be held that it ought to have been pronounced in the very terms of the act of Parliament.

On the other hand, it was pleaded for the trustee,

1. That the composition authorized by the statute is not at all of the nature of the extrajudicial composition contract, but is a sale of the universitas of the estate to the bankrupt himself; and, at all events, that the words of the statute must be the only rule for determining questions regarding such compositions.

2. That the words of the statute plainly mean that all debts are to be discharged, except the composition, and that no weight can be attached to the argument rested on the supposed surplusage, which is so common in all acts of Parliament; and,

3. That as the statute declares that an act or order 'shall' be pronounced in the terms therein mentioned, the Court had no power to pronounce an order in other terms, and that those used must therefore be construed in conformity with the statute.

The Lord Ordinary, on the 25th of November 1823, found 'that the terms of the decree approving of the composition offered 'by the bankrupt, Ronald M'Nicol, under the first sequestration, 'by which he was discharged of all debts contracted prior to the '17th of July 1819, 'upon' payment of the composition, must 'be interpreted according to the terms of the act of Parliament, 'whereby it is enacted that the bankrupt shall be discharged, "*except* as to payment of the composition;'—that, upon general 'principles of legal construction, the words in the statute neces-'sarily mean that the bankrupt is discharged of his debts, with 'the exception of the composition, which makes the composition 'the only debt due by him to his creditors; and therefore that 'under the second sequestration of Ronald M'Nicol the bank-'rupt's estate, the Renfrewshire Banking Company are entitled 'to be ranked on the bankrupt's estate only for the balance of the 'composition still due to them;' and decerned accordingly. His Lordship observed in a note,—'In the arguments of the respond-'ents there is a quotation from the excellent work of Mr. Bell; 'but the Lord Ordinary thinks that some mistake must have 'crept into the passage.'

The Bank then reclaimed; and the Court, being very much divided, consulted the Judges of the First Division, who returned the following unanimous opinion:—

'We are of opinion that the interlocutor in this case ought to 'be altered, and that the creditors whose compositions were not 'paid under the original composition contract, are entitled to 'rank in the second sequestration for their full debt, or for the 'balance which may remain due thereon.

'We are of opinion that the clause of the Bankrupt Act 'founded on cannot, on a sound construction, be held to give to 'the statutory discharge under a composition contract a stronger 'effect than a discharge has under a voluntary and extrajudicial 'composition contract; which discharge, however general and 'absolute in words, is certainly qualified by the condition, that 'the composition shall be paid as stipulated by the contract.

'We are the more clearly of this opinion, because, in composi- 'tion contracts under a sequestration, the composition may be, 'and often is, forced upon a certain number of creditors in num- 'ber and value against their consent. Now, it would be mon- 'strous injustice first to force a man to accept of a composition 'which he considers to be inadequate, and then to force him still 'further to continue bound by this contract, although violated by 'the debtor. Our opinion, too, is confirmed by the analogy of 'other discharges under circumstances nearly similar;—*e. g.* If a 'person in payment of a tradesman's account indorses to him a 'bill, and the tradesman grants a discharge, it has been found 'that such discharge is nevertheless qualified with the condition 'that the bill shall be paid, and all that the tradesman under- 'takes is to negotiate the bill properly; but that if he does so, 'and the bill is not paid, he has a right to come back on his 'debtor on his open account, notwithstanding the apparent abso- 'lute terms of his discharge.

'We do not agree with the Lord Ordinary that there is, or 'can be, any mistake in the passage quoted from Mr. Bell's 'Work, Vol. II. p. 499; for that passage is not founded on his 'own opinion merely, but on the practice and understanding of 'the Court, and of the profession, ever since the act was passed, 'as proved by the uniform style of the interlocutor approving of 'composition contracts, and discharging the bankrupt only 'upon 'payment of the composition.'

'We must presume that the clerks would not have adopted this 'style, varying in words, though not in sound construction, from 'the terms of the act of Parliament, without the authority of the 'Court. At any rate, as many cases have occurred similar to 'the present, the practice has interpreted the statute; for that 'style of interlocutor would have been long ago checked and al- 'tered, if it had not been held to have been authorised by the 'Court, and agreeable to the spirit of the statute.

'And further, we observe from Mr. Bell's work, that the 'doctrine which he lays down, and the opinion which we now 'give, is in conformity with the doctrine of the law of England 'in regard to discharges on composition contracts.'

Notwithstanding this opinion, the majority of the Second Di-

vision, holding the Lord Ordinary's construction to be the correct one, and it not being then imperative to give judgment according to the opinion of the majority of the whole Judges, including those consulted, their Lordships adhered. But the Bank having presented a reclaiming petition, and the late Judicature Act, introducing this regulation, having immediately afterwards passed, they prayed the Court now to alter the interlocutor, agreeably to the opinion of the majority of the whole Judges. This having been objected to, on the ground that the act could only apply to cases where the consultation had taken place subsequently to its being passed, the Court again required the opinion of the Judges of the First Division, and also of the permanent Lords Ordinary, and for that purpose appointed one counsel on each side to be heard before the whole Court. This was accordingly done, and the consulted Judges thereupon returned an unanimous opinion, opposite to the former one, and in the following terms:—'We are of opinion that the interlocutor 'of Lord Eldin, of 25th November 1823, ought to be adhered 'to, on the grounds there stated.'

In conformity with this opinion, the Court again adhered.

Respondents' Authorities.—2. Bell, 499, and Cases there recited, 501, 598; Paul, Dec. 19. 1820, (F. C.); Leigh *v.* Barry, (3. Atkins. 383); Crawley *v.* Killary, (3. Maule and Sel. 120.)

GREIG and PEDDIE, W. S.—A. PEARSON, W. S.—Agents.

Dr. HAMILTON, Pursuer.—*D. of F. Moncreiff—Jeffrey—Cockburn.*

Dr. HOPE, Defender.—*Sol.-Gen. Hope—Skene.*

No. 289.

Privileged Slander.—Slanderous words spoken at a regular meeting of the Senatus Academicus of an University by one Professor of another, in reference to a matter falling within the cognisance of the Senatus, entitled to the benefit of privilege, without proof being led as to the constitution or jurisdiction of the Senatus.

Mar. 10. 1827.

2D DIVISION. Jury Court. F.

IN an action of damages at the instance of Dr. Hamilton, Professor of Midwifery in the University of Edinburgh, against Dr. Hope, Professor of Chemistry in the same University, for certain defamatory words alleged to have been spoken by the latter at a meeting of the Senatus Academicus, the pursuer took the following issue:—'Whether, on or about the 23d day of April '1825, at a meeting of the Senatus of the said University, and in 'presence and in hearing of the Professors then and there pre-'sent, the defender did falsely, maliciously, and calumniously

'impute intended falsehood to the pursuer, by stating that the 'pursuer was a liar, or a malicious and impudent liar; or that he, 'the pursuer, not only lied, but knew that he did so; or did use 'or utter words to that effect, to the injury and damage of the 'pursuer.'

The defender also, having put in a plea of justification, took two issues, as to whether certain statements regarding the mode of teaching in the Medical Faculty of the University were contained in a memorial presented by the pursuer to the Magistrates of Edinburgh, as Patrons of the University:—'And whether the 'whole or any part of the averments aforesaid, contained in the 'memorial aforesaid, were known to the said pursuer to be false at 'the time he presented the said memorial to the said Magistrates.'

These issues having gone to trial before a Jury, a verdict was found for the pursuer on all of them, with £500 of damages; but the defender, having taken an exception to the charge of the Lord Chief Commissioner, tendered a bill of exceptions, which set forth, That it had been given in evidence on the trial, that in January 1824 the pursuer had presented to the Magistrates of Edinburgh, as Patrons of the University, a petition, praying to have the class of Midwifery added to the curriculum of study necessary to qualify medical students for a degree, accompanied by a printed memorial, which the pursuer circulated among the Professors, and which contained various statements as to the mode of teaching adopted in the several classes composing the Medical Faculty, and animadversions thereon, and stating, particularly in regard to the class taught by the defender, that Pharmacy (which it was the defender's province to teach along with Chemistry) was not taught by the defender: That a second memorial, with additional statements to the same purport, was presented by Dr. Hamilton to the Patrons on the 13th of December 1824, and that these memorials were transmitted by the Patrons to the Senatus: That a committee of the Senatus was appointed to report on the pursuer's statements in his petition and memorials: That they drew up a report accordingly, for the purpose of taking which into consideration, a regular meeting of the Senatus was summoned for the 23d of April 1825: That a meeting was accordingly held, at which the defender was present, but which was not attended by the pursuer: That, at this meeting, the defender having moved that the report of the committee be approved of, an amendment was proposed and seconded, with a view to waive any discussion on the report, whereupon the defender rose and spoke at some length in support of his own motion, and with reference to Dr. Hamilton's statements

in his memorial regarding the mode of instruction followed in the medical classes; and that, with reference to certain of these statements, and particularly those relating to his own class, he used the words, 'He lies, and he knows that he lies,' applying these words (being a quotation from Dr. Johnson) to the pursuer: That this meeting was adjourned; and that, at a subsequent meeting, the Senatus adopted certain resolutions expressive of their opinion that the conduct of Dr. Hamilton had been 'highly reprehensible' in various particulars connected with this matter.

The bill further set forth, that the Lord Chief Commissioner, after stating to the Jury that the words 'liar, malicious and impudent liar,' were not proved, but the other alternative, that the defender had imputed falsehood to the pursuer, by stating that he lied, and knew that he lied, must be considered by them, the Jury; and it proceeded to set forth the remainder of the charge as follows:—'And the said learned Judge did observe to the said 'Jury, that the defender, making use of these expressions as a 'quotation from Dr. Johnson, did not prevent the consideration 'of whether they were slanderous or libellous, as that depended 'on the intention with which they were spoken; and the said 'learned Judge did observe to the Jury, that the first question 'for their consideration was, whether the words were libellous— 'that is, whether the words given in evidence as having been used 'are actionable according to the law of Scotland. The said learned 'Judge then gave it as his direction in matter of law to the said 'Jury, that the doctrine of the law of Scotland was, that when 'the moral character of an individual was brought into question, 'and the harassing of the mind is the effect of words spoken, 'such words are actionable; and, in this sense, words importing 'intentional falsehood are libellous, and the offence is proved, if 'the words flowed from a malicious intention in the speaker. 'The said learned Judge then directed the said Jury, that the 'summons and issues in this case stated the words to be maliciously used: That the rule in ordinary cases was to aver only that 'such words were falsely used. But if it was a protected case, 'then the words maliciously, as well as falsely, were required to 'sustain the action; and accordingly the word maliciously was 'inserted in the issue, on which two observations arose: 1. Was 'this a privileged discussion in a protected place? 2. If not a 'protected place, it was sufficient that the Jury were satisfied of 'the malice which the falsehood implied. The learned Judge 'then stated, that there was no evidence of the constitution of the 'Senatus Academicus; that nothing was proved to establish pro-

'tection; and that as to malice, if that could be made out, it was 'for the Jury, who were to take it in two points of view; 1. As 'to *extrinsic* evidence of malice; 2. *Intrinsic*, or malice arising out 'of the facts and circumstances of the case, and out of the char- 'acter and nature of the words proved. As to the first, the learned 'Judge observed to the said Jury, that there was no evidence 'given of extrinsic malice. As to the second, it was a question 'for the said Jury, on the whole proof, to consider with what ani- 'mus Dr. Hope spoke the words, and whether they were mali- 'ciously said. The said learned Judge could not state it to the 'said Jury that this was a protected place. The words used were 'not protected by the place where they were spoken. It was 'therefore for the consideration of the said Jury, whether the 'words used by Dr. Hope, if they were said falsely of Dr. Ha- 'milton, were also said maliciously, although there was no ex- 'trinsic evidence of malice. And, with that direction, the said 'learned Judge left the same to the said Jury.'

The bill then stated, that thereupon 'the said counsel for the 'said defender did then and there, on behalf of the said defender, 'except to the foresaid direction of the said Lord Chief Commis- 'sioner, and did insist that he ought to have directed the Jury 'to find a verdict for the said defender, on the ground that the 'discussion at the meeting of the Senatus Academicus, on the '23d of April 1825, was a privileged discussion, in which the de- 'fender was entitled to take part, and that the defender had con- 'fined himself to the proper subject-matter of that discussion; 'that the expressions then and there used by the defender re- 'ferred solely to the representations laid by the pursuer before 'the Patrons of the University, as to the manner in which the de- 'fender and certain of his colleagues discharged their professional 'duty; which representations were contained in the foresaid peti- 'tion and memorials, which were then regularly under discussion 'in the Senatus Academicus; and likewise on the ground that 'there was no distinct proof of express malice in fact given in 'evidence to make out a case of malicious libel.'

This bill having been presented to the Second Division of the Court of Session by the Lord Chief Commissioner, counsel were heard in terms of the statute.

Solicitor-General Hope and *Skene* in support of the bill.—The general plea which the defender maintains is, that this is a case entitled by law to privilege, and that there ought to have been a direction by the Judge to that effect, and that, on the facts, there was nothing to take from the case the benefit of protection. The argument in support of this plea may be divided into four heads.

1. In regard to the general principles applicable to cases of this description. Slander may be divided into three classes:— (1.) Those in which the presumption of malice is against the defender, and inferred merely from the words used, as in cases of ordinary slander. (2.) Those in which the presumption of malice is entirely excluded, as in regard to words spoken in Parliament; and, (3.) Those in which the occasion of speaking, and the character and situation of the speaker, protect the use of actionable words, so far as to rebut the presumption of malice, allowing it, however, to be proved aliunde. In regard to the two last cases, the principle is the same, viz. that the use of actionable words is protected by the occasion, with this difference, that in the one, proof of malice is allowed, while in the other it is excluded. The leading principle of privilege is this, that there exists a legitimate occasion or call on a party to express his opinion on the matter in question. In such a case, the law never presumes an injurious or malicious motive, however strong the expressions may be. The presumption of malice in other cases is founded on this, that there is no occasion nor call to express an opinion; and that the doing so presumes an intention to defame, as there is no other fair motive to which it can be referred. But a malicious motive cannot be presumed when the party is in the discharge of a duty, if he be not guilty of inventions in point of fact, but merely express an opinion when he is entitled to do so. This principle applies to the case of all persons in situations of public trust, and the Senatus Academicus of an University affords an instance where the principle also applies. The right of discussion in any legally constituted body gives privilege in a greater or less degree; and if there be privilege, excess in the language employed in a privileged case cannot take it out of the privilege, if the words relate to the subject under discussion, and are the expression of matter of opinion, and not the fabrication of facts. In the present case there is confessedly no extrinsic proof of malice, and there is not a case on record, where, in regard to privileged slander, action has been sustained on mere excess in the words used,—extrinsic proof of malice being always held to be necessary. This may be clearly seen to be established by reference to Starkie on Evidence, Vol. II. p. 862–9, 902, &c., and the cases there mentioned; while the expression of some of the English writers, that the primâ facie presumption is in favour of malice, is easily explained by the circumstance of the issue in the English Courts going at once before the Jury on the general averment of the plaintiff, without the nature of the defence, or the occasion when the words were spoken being known beforehand, as is the case according to our forms.

2. In regard to the effect due to the form of the issues in this case. The form of the issues is settled with reference to the above general principles, and under the issues in this case the defender was entitled to a direction conclusive in his favour. The occasion on which the words were spoken being a matter admitted, the form of the issues taken is very important. At framing the issues, reference is always had to their effect. In cases of ordinary slander, the issue sent to the Jury is, whether the words have been spoken *falsely* and *injuriously*; but it is not put that they have been used *maliciously*, because in these cases the law infers malice. But, in privileged cases, the privilege appearing from the pleadings, the issues then lay on the pursuer the burden of proving malice, and put it to the Jury whether the words were used *maliciously*, as well as *falsely* and *injuriously*; and when that is the form of the issue, malice must be established by proof, and cannot be inferred from the words. The defender is bound, at settling the issues, to raise the question of law, whether the case is privileged, and whether malice must be proved; and accordingly, by the issues as here settled, the privilege was allowed, and the burden of proving malice laid on the pursuer; but the charge nevertheless disallows the privilege which the issues give right to. The privilege is not exhausted by the mere insertion of the word 'maliciously' in the issues, and requiring the Jury to answer whether there has been malice. The question to them, in a privileged case, is whether malice be proved extrinsically; and the pursuer must establish malice, as put in issue, independently of the words spoken; and under this issue, therefore, in respect of its construction, which necessarily admits and implies privilege, there ought to have been a direction in favour of the defender, that there must be extrinsic evidence of malice to warrant a verdict for the pursuer.

3. The facts given in evidence establish a case of privilege, even if not given by the form of the issue. These facts must be taken from the statement in the bill alone, and the verdict cannot be looked to as fixing any thing in fact; because the question is, whether the direction on which the verdict proceeded was a good direction on the facts as stated in the bill; for, if the direction be bad, the verdict is cut down. This Court, therefore, must look at the evidence as there set forth, and judge whether, there being no extrinsic evidence of malice, the charge was right in saying that the Jury were to consider whether the words were used maliciously. The result of the evidence is, that the words founded on were used at a meeting of the Senatus Academicus, regularly summoned and convened:—that the pursuer and defender are both

members of that body:—that the subject-matter before them was the pursuer's charges in regard to the medical classes:—that the meeting was called to consider of this:—and that the defender's observations were strictly confined to the subject under discussion. The principles of the law of privilege distinctly apply to, and include such a case as this. Whether the Senatus had truly a jurisdiction in regard to the matter before them, it is at least clear that they and the defender believed that they possessed such jurisdiction; and it ought therefore to have been put to the Jury, in the charge excepted against, that the privilege was equally good, if they believed they had jurisdiction, as if they really had it. The charge, however, does not state the case as privileged, or say that malice must be proved; but merely, that, to sustain the action, it was necessary to insert the word 'maliciously' in the issues; and that whether there is intrinsic evidence of malice, is a question for the Jury. The Judge also says, that he could not state that the place where the words were spoken was a protected place, or that the words used were protected by the place; and therefore that it was for the consideration of the Jury whether they were maliciously said, although there was no extrinsic evidence of malice. The charge is thus erroneous in three particulars: 1. In excluding privilege, and not saying that malice must be proved extrinsically; 2. In not having at least stated the privilege in mitigation; and, 3. In not having directed the Jury, that if they were satisfied the defender believed he had right to discuss the subjects under consideration of the Senatus, he should have the benefit of the privilege. The charge being thus erroneous according to its plain meaning, and as it would be understood by unlearned men, the defect cannot be cured by critical discussions as to what meaning may be extracted out of it, different from what would strike a Jury of ordinary men. If the Judge intended to allow the privilege, it should have been so stated plainly and distinctly; but, as the charge stands, the impression on the Jury must have been, that the privilege was disallowed, while, in point of law, the defender was entitled to the benefit of it.

4. In regard to the ground on which the privilege has been disallowed. This is, that there was no proof of privilege led. The form of the issue, as already adverted to, is a sufficient answer to this. But further, the place where the words were used, and the subject-matter of the discussion, were proved in evidence, and that was all which was necessary. The foundation was laid in the facts of the case; and it is a question of law, not of fact, whether the occasion, as coming out in evidence, protects the words. It is maintained on the other side, that whether the place be

privileged is matter for the Jury. We are here at issue; for we say that it is for the Court to determine. It is admitted on the other side that it would not be necessary to lead evidence as to the constitution of kirk-sessions or presbyteries, because they are bodies known in law. But is not the Senatus Academicus of an University equally known in law? It is a legal body, having the right to elect a member to the General Assembly, and entitled to exercise certain powers in reference to the University. In the case of Scarlett, it was found unnecessary to lead evidence of the constitution of the Bar, to entitle it to privilege; and the same was held as to Courts-martial in the case of Jekyll *v.* Sir John Moore. Where the nature and constitution of the body is notorious, as is the case here, it is not necessary to lead evidence to prove the privilege; but that must be judged of by the Court, and stated to the Jury as matter of law; and, in the whole circumstances of this case, it ought to have been stated to the Jury that the words used were used in a privileged discussion, and in a privileged place.

D. of F. Moncreiff, Jeffrey, and Cockburn in support of the verdict.—The question is, Whether the charge given to the Jury is contrary to law? The defender, who says there has been misdirection in law, must make that out, not by taking single passages of the charge, while he neglects the general substance, but on a consideration of the plain meaning of the whole. There is considerable difficulty in the present argument, from the circumstance that it must be founded on the evidence, while we have not the whole evidence before the Court.* Some things, however, may be taken as fixed. The action is one of damages for slander, the summons in which libelled malice; and the pleas in defence against it were, 1. Absolute protection; 2. Denial of the words alleged to have been used; and, 3. An offer to prove their truth in justification. In reference to these, the issues were settled. The libel charged malice, and the issue bore whether the words were spoken maliciously. The verdict fixes that the words were spoken, and the ground of exception has no reference to what were the words spoken, or whether they were spoken truly or falsely. There is nothing in the charge which can affect the verdict on these points, or in so far as it negatives the defender's averment of the truth of the words used. It is therefore definitively fixed that the words were spoken, and spoken falsely. The verdict also finds that they

* The Court stopped the counsel for the pursuer from alluding to evidence said to have been laid before the Jury, but not contained in the bill, and refused to listen to any statement of evidence other than that in the bill.

were maliciously spoken; but we admit, that if the exception be well founded, it applies to this last point; and the charge must be considered, if an objection will lie to the verdict on this point. The result of the exception is, that the verdict would not have found malice, if the Jury had been rightly directed in law. It is important, however, that there is no attempt to impeach the verdict as contrary to the evidence; and we may assume that the verdict cannot in any form be reviewed as contrary to evidence. The question, therefore, is confined to one of law. But, before entering into the general argument, it will be proper to attend to certain preliminary points. 1. A party tendering a bill of exceptions must except to something said by the Judge; not to the circumstance that something has been omitted to be said, in which case the remedy is by a motion for a new trial, on the ground that the verdict is contrary to evidence, which would be made out by showing the principle of law, and that on the whole evidence the verdict should have been different; and this strikes at a great deal of the argument for the pursuer, in regard to alleged omission in the charge to state that the case was privileged. 2. The party excepting is bound to state in his bill the law which he insists the Judge should have delivered; and it therefore follows that he must hold by the law as inserted in his bill, and cannot alter or add to it, or ask from the Court, law of a different kind, as the defender did in his argument, when he maintained that the Judge should have told the Jury, that if the defender believed he was in a privileged discussion, that was sufficient, there being nothing of this kind in the bill. 3. In stating what should have been charged by the Judge, the party is only entitled to require law, not that there should have been statements as to the result of the evidence. But the charge, as required in the bill, relates chiefly to matter of evidence, not of law, as when it requires the Judge to state that a case of privilege has been proved; and, 4. It is next to be attended to, that that part excepted against is only a small part of the whole charge; and if it be interspersed with observations on questions of fact, these cannot be taken up, as we have not one-tenth of the evidence before the Court in this bill. It is therefore absolutely necessary to separate the charge on matters of fact from the direction on matters of law.

With these preliminary observations, we shall proceed to consider the plea of privilege maintained by the defender; and, in regard to that, we have no occasion to dispute the fundamental principles laid down on the other side; but it is necessary to distinguish between the case of absolute protection and that of privilege. A judge has not mere privilege, but an absolute protection. Pri-

vilege is this, that there is something in the situation of the party, looking to the words and circumstances, which presumes a fair and just intention, whereby malice is not to be inferred merely from the falsehood, but must be made out as a substantive fact to the Jury. There are various shades of this privilege; but whenever we pass judicial proceedings, the fact of privilege, except in known settled legal situations, must be matter of fact to be given in evidence. Even in the case of master and servant, it must be matter of evidence whether the master has been acting entirely in his character of master; and in every case the whole circumstances must be matter of evidence, before it can be made out that there is any privilege at all. There may be privilege in regard to a Professor in an University censuring a student, and there may be privilege attached to a Senatus enforcing discipline, though this will depend on the constitution of the University; or the Senatus may possibly possess a privilege in exercising control over Professors themselves; but this is not to be assumed as a matter of course. The power of enforcing discipline and control must be established, before privilege can be maintained. No evidence, however, was offered on this point. But, supposing that such a case of privilege could be assumed as matter of fact from notoriety, it must further appear that the party did speak under and within the privilege; and whether he did so or not, is matter of evidence; for it is not alleged that every thing that may be said at a regular meeting is privileged; and therefore it is a question of evidence for the Jury, whether the words were spoken under protection of the privilege. It is admitted by the defender, that if the words spoken are not pertinent—if there be invention of facts—if spoken under colour and pretext merely, however pertinent, there will be no protection. And there is another case in which there is no protection, viz. if words are spoken, which, by natural import and common sense, mean insult, without strengthening any useful averment or discussion. Words so used do not imply, but actually express, the malice which excludes privilege; and therefore, whether words are protected by privilege, is always a question of evidence for the Jury. The nature of the place—the character of the body—the pertinency of the words—the bona fides in applying them to the subject-matter before the meeting—all go to the question of privilege, and are matter of evidence for the Jury.

There is no difference between privileged cases and any other, except that in the former malice must be proved, and that in the latter it may be inferred from the falsehood of the words. The meaning of the rule as to privileged cases is, that the Jury must

be satisfied of malice specially, independently of the use of actionable words. The dicta as to extrinsic evidence of malice merely mean that there must be malice, independent of the injurious quality of the words; but, in judging of the malice, the nature of the words is not to be thrown out of view. And this is of importance in regard to the English cases, because in England malice must always be matter of evidence, and privilege also, except in known cases; and so, if we find it stated in an English case that it is privileged, and yet see that the question of malice is left to the Jury, although there be no extrinsic evidence of malice, it is clear that the circumstances or words prove malice, without extrinsic evidence at all. All the authorities (as, for instance, Starkie on Libel, 2. 241, and on Evidence, 2. 862. 912. 3. 4.) go to the point, that it is a question for the Jury, whether there be malice or not, even in the strongest cases of privilege. The malice may be inferred from the words and circumstances, and this is the province of the Jury. Nor is this inconsistent with the doctrine, that in privileged cases there must be substantive proof of malice, as there may be real evidence of malice in the words and circumstances alone. So stands the law of England.

In Scotland, till the case of Williamson, there was scarcely an instance of malice being libelled, as formerly it was always held to be inferred, and the Court judged on the whole matter, giving effect to privilege, when established in the record before them. In the case of Williamson, where it was settled that malice must be libelled, there was no special condescendence of malice required, and the case was sent to the Jury, without any extrinsic evidence of malice; and the same has been the case in the various cases of privileged slander which have occurred since.

The presiding Judge in the present case, therefore, gave his charge in accordance with the law both of Scotland and of England, when he left it 'for the consideration of the Jury, whether 'the words used by Dr. Hope, if they were falsely said of Dr. 'Hamilton, were also said maliciously too, although there was no 'extrinsic evidence of malice.'

It has been said on the other side, that the form of the issue rendered extrinsic evidence of malice necessary. The word 'ma-'liciously,' however, was put in the issues, because privilege might be proved, and it was necessary in consequence of the defender having averred a case of privilege. The pursuer, however, was not bound to bring this question to issue beforehand, as it depended on matter of fact; nor is it conclusive of privilege, but merely implies that privilege might have been proved, and indeed malice is often averred, where no privilege is dreamt of.

We must look, then, at the circumstances of the case. The words founded on are proved to have been spoken, and the plea of truth in justification has been negatived by the verdict. They were, therefore, spoken falsely. No doubt, they were spoken at a meeting of the Senatus; but there was no evidence of the constitution of the Senatus, or of its jurisdiction over individual Professors, particularly as to a matter which had been addressed to the Patrons. The matter, too, before the Senatus was not the personal conduct of Dr. Hamilton;—if a subject of discussion at all within the province of the Senatus, it could only relate to the accuracy of the statements in Dr. Hamilton's memorial. There was no question before them as to his motives or principles, and they had no jurisdiction to take cognisance of his personal conduct. Thus there was no proof of privilege—the powers, jurisdiction, and constitution of the Senatus were quite unknown; and indeed it is judicially denied, in an action at present in Court at the instance of the Patrons, that they possess any jurisdiction. But at all events there was no proof of privilege, or even of the belief of privilege. The question, however, is, Was there a privilege to protect the words used? It is said that the words merely expressed an opinion; and yet the defender gave in a plea in justification, the foundation of which necessarily is, that the words were true *in fact*, it being impossible to allow a justification of a mere opinion. Further, the words were not pertinent, as the pursuer's personal conduct could not be a subject of discussion in the Senatus. They were also an invention in point of fact, as the verdict has negatived the offered justification; and they were spoken merely under colour and pretext of being in discussion of the memorial, as is established by the words themselves, which are not fitted to further any public duty or investigation. The place, so far from giving the protection of privilege to the words, proves that it was resorted to, only as a pretext for using them. It is not the *intensity* of the words, but their *character*, which, we contend, deprives them of the privilege; and though the privilege were primarily established, there is abundant proof, even in the statement in the bill, of the malice which the law requires.

The memorial of Dr. Hamilton to the Patrons was dated in January 1824—the meeting was in April 1825. The Senatus had already come to final resolutions on the subject—the pursuer was absent—there was nothing to excite passion—and yet the character of the words used is such as shows that they must have been intended for the purpose of insult, and not for pursuing the fair object of any investigation; and the place, instead of raising a privilege for the words, does, added to the words, demonstrate

malice; and that they 'must have been solely or chiefly used for 'the purpose of injuring' the pursuer. There needs no other evidence, especially when we consider the condition in life of the parties, and the cool and deliberate offer to prove the averment in justification, which has been negatived by the verdict; and that is extrinsic evidence, if they will have such.

The most essential part of the case still remains,—viz. the character of the charge, as given by the presiding Judge. It is admitted that the general doctrine of law is properly laid down in the first part of the charge, and it is the latter part that is excepted to. But the whole charge, in truth, proceeds on the supposition of privilege said by the defender to be implied in the form of the issues.

The Judge says, if there be no privilege, the malice may be inferred from the falsehood; but if the case be privileged, the Jury must determine, in the whole circumstances, although there be no extrinsic evidence of malice, whether the words were maliciously spoken; and this is certainly in strict accordance with the law.

In conclusion, it may be observed, that the rule in regard to a Judge's charge, and which applies here, is well laid down by Mr. Starkie in the following passage of his Work on Evidence, (Vol. II. p. 883):—'If the publication in consideration of law 'be libellous, then it is a question of fact for the Jury, whether 'it was wilfully and maliciously published; subject, however, to 'the ordinary presumption of law, that in absence of proof to the 'contrary, a man intends that which is the natural consequence 'of the means which he employs. It follows, that neither the Jury 'nor the parties have a right to expect from the Court any specific 'and direct opinion on the whole of the case, or any other than 'that which is ordinarily given at the discretion of the Court to 'the Jury in parallel cases, with respect to the verdict which they 'ought to find, in point of law, as dependent and contingent upon 'their conclusions, in point of fact, drawn from the alleged libel 'itself, and all the circumstances of the case as to meaning, motives, and intention of the defendant.'

The Court, (after delaying a few days to consider the case,) by a majority, allowed the exception, and granted a new trial.

LORD JUSTICE-CLERK.—The question for the decision of this Court, raised on the bill of exceptions presented by Dr. Hope, has been argued at the Bar with uncommon ability and learning on both sides; and, after taking time to consider the case, we are now called upon to pronounce judgment. It has been stated from the Bar, that the case was felt by them as one of novelty and difficulty; and I must

say for myself, that it has presented itself in the same point of view to me, for we have hitherto had but little experience in such discussions, and none relative to the same sort of action as the present. Although I have consulted all the authorities referred to on both sides, and have endeavoured to make up my mind in as satisfactory a manner as possible, I am by no means very confident of having arrived at an unexceptionable conclusion. But it is to me a matter of infinite satisfaction to know, that, if I have erred, there is a quarter in which I may and will be set right. We are now called upon to decide upon this bill of exceptions, taken and prepared with all due care in the Jury Court, whether, on the trial of the issues, which led to the verdict therein stated, the charge or direction in point of law, given to the Jury by the presiding Judge, was or was not in accordance with the law of the case? For deciding this point, I must premise that it appears to me quite certain, that, in order to the determination of it, whatever facts may be necessary can only be taken as they appear on the face of the bill. All that was considered and deemed to be necessary for deciding upon the legality of the direction in point of law has been deliberately set forth in the bill, and we cannot go beyond it. I must also observe, that, notwithstanding the form of the issues, and the verdict being for the pursuer on these issues, it does not appear to me that we can assume, in opposition to the express statement on the face of the bill at p. 13, that the words put in the first alternative of the first issue were proved to have been used by the defender, but that the attention of the Jury was confined to the second alternative of that issue only. Before, then, proceeding to the consideration of that part of the charge which is excepted to, we must keep in view the general rules of law that are applicable to cases of this nature. 1. I take it then as quite fixed, that in ordinary cases, where an action is brought, concluding for damages for slanderous words, where no case of privilege whatever can be pretended to exist, it is sufficient for the pursuer to prove the use of words of a slanderous, defamatory, and injurious nature, and that in such a case the malicious purpose of using them will be inferred without any further proof whatever. 2. Upon the other hand, it is equally clear, that while there are two classes of cases which afford an absolute protection against an action for alleged slander, viz. Parliament, and the case of Supreme Judges acting in judicio, with which we have here no concern, still, in all cases that are held by law to be of a privileged nature, the presumption of the law is against malice; and it is therefore incumbent on the pursuer of an action for the use of slanderous words, under such circumstances, to bring evidence that will satisfy a Jury, that, notwithstanding the privilege founded on, the expressions were used maliciously by the defender. This is stated by Mr. Starkie in a passage quoted from the Bar, and which explains the matter most correctly, p. 231, Law of Slander. 'In the two classes of cases immediately preceding, the presumption

'of law is conclusive in favour of the defendant's innocence of intention. There is another, although the motive of the party be not wholly exempted from examination, yet, in consideration of the character in which he has acted or assumed to act, the law will presume in his favour in the first instance, and require the plaintiff to rebut the presumption in some particular mode.' In regard to the question, what sort of evidence is required to establish malice in cases of privilege, or in what mode the presumption of law is to be rebutted, it appears to me, from the best consideration of the authorities, that it cannot be held that nothing but direct and positive proof of malice, altogether apart from and independent of the case itself, can avail. On the contrary, it appears to me, that while it is competent to prove by separate, distinct, (and what is sometimes termed) extrinsic evidence, independently of the case itself, that malice influenced the defender, it is also competent to require the Jury to take into their consideration the whole circumstances of the case itself, with the conduct of the party in relation to time, place, and the pertinency of his words to the subject-matter of the privilege, and decide if there is sufficient evidence of malice. I think the view that I have now stated appears to be correct from a case mentioned by Mr. Starkie at p. 242, which seems to me of great importance in the present case. The same point seems to me to be well illustrated in another passage of the same work, p. 260. Such, then, being the general nature of the authorities on this point in the law of England, which always has been held entitled to regard with us in questions of this nature, and keeping in view the certainty of the fact, that cases of privilege are of great variety, some greater and some lesser in degree, but in all of which it is indispensable that the presumption in favour of innocency of intention must be rebutted in some mode, we must attend to what seems to be the settled rule in regard to the adjustment of issues in such cases of privilege in the Jury Court of Scotland. Contrary to the practice of England, where it is not at all required in such cases to set forth malice in the declaration in an action for slanderous words, it has been settled, that in all the privileged cases of whatever kind, the issue must bear whether the words were maliciously used, as well as falsely and injuriously, which last are alone sufficient in the ordinary case. Now, this being the settled rule in all such cases, it appears to me that in every such case the defender in issues so framed goes to trial with the presumption of law already fixed in his favour, subject, no doubt, to all the exceptions that may arise out of the alleged impertinency of his observations, &c.; and under such issues so settled, it does not appear to me that the onus of proving the privilege—for example, the establishing by proof the constitution of the meeting, incorporation, or Court where the slander is set forth to have been maliciously uttered—can be laid upon the defender, or that he can be turned round and told he has no privilege or protection for the want of such

proof, more especially if no denial has been entered, or issues taken as to the existence of such privilege. To apply these views to the present case, let us attend to the issues before us in the bill of exceptions, with the admission on which they rest. Now, I must here state clearly and explicitly, that it appears to me quite undeniable, both independently of the contents of the bill, and in consideration of what is the evidence set forth in the face of this bill, parole and documentary, that a Professor, discussing a matter which has been regularly brought before a Senatus Academicus, and that of the University of Edinburgh, whether relative to the conduct of a brother Professor, his own individual interest as a Professor, or those of the body to which he belongs, stands in a privileged situation, with the presumption of law in favour of the innocence of his intentions as to the use of words of a slanderous nature,—keeping closely to the subject of discussion, not travelling into impertinent matter, or using the occasion as a cover and cloak for malice, as indicated by the whole of his conduct and circumstances of the case. Whether the malice which law requires to warrant a verdict against him for slanderous words is sufficiently proved against him, it will undoubtedly be for the Jury to decide, even although no extrinsic proof of malice has been led. But in such a case, after such issues as were here settled, fixing it to be a case of privilege, if it were possible to hold that extrinsic evidence of privilege to some extent or other was still to be held as matter of doubt, it is impossible for me to lay out of consideration the body of evidence narrated on the face of the bill, as to what was the subject-matter of deliberation of the Senatus Academicus, or the occasion of the question, the transmission of the memorial of the pursuer by the Patrons to the Senatus, the regular manner in which the discussion commenced, was proceeded in and conducted, the adjournment, and the subsequent resolutions adopted by a great majority of the Senatus Academicus, (and which, if there exists no privilege, might have been viewed as bearing most severely on Dr. Hamilton,) as establishing beyond all doubt that the issues do no more than was right, in holding that the case submitted to trial was one of a privileged nature. Such, then, being my opinion as to the nature of the case that was here subjected to trial, I have only further to state, that it is the province of the Court or presiding Judge to state the privilege to the Jury. They must take the law from him, and from him alone, before they can approach the consideration of the evidence, either regarding the actual proof of the slanderous words having been used, or the evidence on which the pursuer relies to meet or rebut the presumption of law as to the innocence of the intention of the defender. No authority need be referred to in support of what is plain and evident in itself; but there is a case bearing directly on the point, viz. that of M'Lean v. Fraser, (3. Murray, 355,) as to alleged defamation by a clergyman at a meeting of presbytery; where the law appears most correctly laid down

by the Lord Chief Commissioner. I have only further to observe, that in regard to a place of a privileged nature, when it is necessary to direct the Jury in matter of law, as well as in many other cases, it appears to be indispensably necessary that the law should be laid down in plain, apt, and explicit terms, and in such as a Jury of ordinary men can be at no loss whatever to comprehend. Keeping also in view that a bill of exceptions cannot be taken upon observations made on evidence—that it is to the law laid down in a charge, to which alone exception can be taken—that the whole of the charge in matter of law is to be taken, and no judaical construction of it resorted to, or a sense attached only to one or two passages picked out from a context admitting of a different construction—we are bound to consider whether the direction given to the Jury in this case was such as the view of the case required. I am quite aware of the difficulty of adhering to perfect precision after the fatigue of a long trial. But this bill has been deliberately prepared, and narrates the charge with the greatest fairness and (we must presume) accuracy. I have no intention to enter into a very minute criticism of the words used from the bottom of p. 13 to the end, although I cannot concur in the view that has been assumed by the pursuer as to the fair and obvious import of several passages in it. Reading the whole words from beginning to end, it seems impossible, in my opinion, to doubt that this was not stated to the Jury to be a privileged case, as, in my opinion, it unquestionably was. I can find no words that so state it in plain terms, and without such an explicit statement having been made to the Jury, it does not appear to me of any consequence, that in observation to the Jury in reference to evidence, that which might have been quite correct, if the privilege had been distinctly stated to exist, may be gathered or held to be implied from other passages. In my opinion, after what is stated as to the insertion of the word 'maliciously' being required to sustain the action, if it was a protected place, what follows is so expressed as to lead the Jury to hold that this was not a privileged discussion in a protected place. I am not quite aware of the true sense in which the words 'protected place' are here used, but must take them as referring to a limited protection or privilege, as it has never been contended that the Senatus Academicus afforded a total protection, such as Parliament or a Court of Law. Although it may be argued that the observations made do not positively assert whether it was a case of privilege at all or not, yet even if the Jury were left to form their own opinion on this vital and most important point, before considering whether the words were maliciously used, that appears to me to be a total error in the charge, as leaving what is the question of law for the decision of the Jury, instead of its being explicitly laid down by the Court. Indeed, after stating so explicitly to the Jury that there was no evidence of the constitution of the Senatus—that nothing was proved to establish protection, it is impossible for me, putting a fair and consistent mean-

ing on the charge, to hold that the learned Judge did at the same time tell or intend to tell the Jury that it was a privileged case. Accordingly, we have formerly noticed, that in the case of a master giving a character of a servant, although the question of malicious intention was left to the Jury upon the whole evidence of the case, it was stated by Lord Ellenborough to the Jury, 'I am inclined to 'think that this was a privileged communication.' I need not notice Lord Gillies' charge in the case of Gilchrist *v.* Dempster, as certainly there can be no doubt that the law was there fully stated to the Jury. If in this case it had been explicitly stated, that if the words used were pertinent, there could be no doubt of the privilege, or that it was admitted, the case would have been widely different.

In concluding, I must notice the passage from Mr. Starkie, p. 883, with which the Dean of Faculty closed his very able argument, which, as read at the moment, made an impression on my mind as to how a charge ought to be dealt with in a case of this kind. I find, however, that the passage relates to a different matter altogether. As to the objection to the concluding sentence of the bill, in regard to what the charge ought to have been, being such as cannot warrant its being allowed, I do not think it can be maintained with effect. The precise terms on which the defender insists the charge ought to have been given to the Jury may not be stated with perfect technical accuracy, but it certainly does state what in substance is sufficient, namely, that the discussion in the Senatus was a privileged one, in which the defender was entitled to take part; and I cannot see that, in what follows, there is any thing stated that can be held to vitiate this bill of exceptions, which, for the reasons I have stated, must in my opinion be allowed, and a new trial granted.

LORD GLENLEE.—We cannot suppose any particular fact to be found by the Jury. No particular expressions are found, but generally that the defender had imputed wilful falsehood to the pursuer. I therefore lay out of view all but what the complainer complains of—viz. that he was entitled to have had a direction that the case was privileged. His objection is, that the Jury should have been directed to find for the defender, in respect of the place and meeting being privileged, which he said he had proved, there being no extrinsic proof of malice, and that the Judge should have stated, If you, the Jury, are satisfied that the words are pertinent, &c. and that there is no extrinsic proof of malice, the place being privileged, you will give a verdict in favour of the defender. We must judge of the bill, as of the charge, by what was the real meaning of the words employed; and I think the defender's exception amounts to the sense I have mentioned. We are here to determine whether, on the whole, the Jury retired with the impression that it was of no consequence whether there was extrinsic proof of malice, and whether the case was privileged or not; and we must consider what plain honest men would conceive of the charge. I must here observe, that there might

have been a difficulty, if the Judge had said nothing of protection at all. That case I shall consider when it occurs. But here he said a great deal about protection; and his declining to make an explanation when the exceptions to the charge were stated, is just tantamount to saying more strongly than before that there was no privilege. And we must keep this in view in considering what must have been the impression of the Jury on the matter; for I conceive that we must attend to the meaning of the charge as it would be taken by ordinary men; and we must not draw a meaning which only the initiated can discover, or go into nice grammatical constructions, although even in these I do not think the defender was very successful. It is a much more important plea, that, in consequence of the way of framing the issues, protection was allowed; and that every thing said must be held as if it were taken for granted there was a privilege. Now, no doubt, it is not necessary to libel malice where there is no protection; but it does not follow that malice may not properly be alleged in such a case, for it is a very different thing, as to the question of damages, whether there be malice or not; and it is very material to show malice even in a protected case. It rather appears to me, therefore, that as the Judge states that nothing was proved to establish protection, and then states different kinds of evidence of malice, and says this case is not protected, and therefore you will consider of the malice on the whole matter, that he leaves it to them as a case without privilege; and with this view of the meaning of the charge, I am of opinion with the Lord Justice-Clerk that the exception must be allowed.

Lord Pitmilly.—This is a case of considerable importance, and I have bestowed the most anxious consideration on it. The distinction between common and privileged slander is, that in the one the law presumes malice; and in the other, the pursuer must prove, in some way or other, that the words were used maliciously. Certain persons are entitled to speak of their neighbours from duty, &c. In regard to slanderous words spoken by them, the legal presumption is, that they spoke from such motives; and the pursuer must prove malice against the presumption. As to the kind of proof, and whether the pursuer is limited to extrinsic proof, I have no hesitation in agreeing with the doctrine laid down from the Chair, that the whole circumstances are to be considered by the Jury in proof of the malice; nor is there any inconsistency in the law presuming against malice, and yet taking all the circumstances into view in proof of it. The next question is, whether it lies on the Court to lay down if the case be privileged, and how this is to be done? I have no doubt that privilege is a question of law to be laid down by the Judge, and it comes under consideration of the Court when the issues are drawn. If clearly not a privileged case, the issues only ask if the words were spoken falsely and injuriously;—when privileged, they always ask also if maliciously spoken. Innumerable instances of this practic[e]

have occurred in the Jury Court; but the strongest illustration is the case of Gibsons v. Marr, (Murray, 258,) where the same scandal was charged twice. In the one instance it was privileged, and in the other not so;—accordingly, maliciously was put in the first, and not in the second. There may be a doubt whether a case is privileged or not; and the doubt may be either as to the fact, or as to the law. If as to law, the rule is to have it decided beforehand. This is quite established; and accordingly, I observe that in the late case of Milhollan v. Dalrymple, (ante, Vol. V. No. 105,) the question as to whether malice must be averred arose at adjusting the issues, and the case was remitted to this Court to have that question settled. If the doubt arises as to point of fact, it would be a difficult question how to deal with it; and it is not settled. The next question is, Who are the parties entitled to this privilege? When not an adjudicated case, we must look to the principle which governs all cases, where it is the duty of a party to speak of his neighbour,—as a master in giving a character of a servant, or when he is in the exercise of a legal right as a litigant. Where a person is called on or entitled to speak of his neighbour, he must confine himself to what is pertinent; and it is of importance, that, so far as we are entitled to judge of words charged here, the verdict, according to the statement in the bill, is limited to the words as in the second alternative of the issue. I certainly have no doubt that this is a privileged case. It is proved by the admissions that both parties are Professors, and that the words were spoken at a meeting of the Senatus Academicus, summoned for the discussion of a question arising out of Dr. Hamilton's memorial, and the statements in that memorial; and understanding the nature of privilege to be as I have already stated it, I think the language so used was of the nature of a privileged discussion, so as to lay on the pursuer the proof of malice. Then, did the defender omit any thing necessary to prove his privilege by proving the constitution of the Senatus? I speak with deference, but think that no proof of the constitution was necessary, and that the legal presumption lay against malice. To this extent it was enough that the defender was a Professor, and in his own body called for the discussion of this subject. The point on which I demur is, that the charge does not state that there is no privilege or protection, but only that there is no evidence of privilege, which is an observation on the fact. In considering the charge, therefore, I will confine myself to what are observations in point of law, which alone can be the subject of a bill of exceptions. Two parts of the charge contain observations on law. No objection can be taken to the first part, on page 13 of the bill. But it is the other point of law which it lies with the Court to fix, viz. whether this was a privileged case, or one of common slander, that I have always felt the greatest difficulty. I am aware that, in judging of the direction, it must not be allowed to pick out detached sentences—we must take the fair import of the charge.

But, on the whole of it, I cannot persuade myself that the Jury could consider that the case was left to them as a privileged case; and I therefore cannot bring myself to think that the exception should be overruled.

LORD ALLOWAY.—There are some principles applicable to this case, which I understand to be clear and incontrovertible. The first is, that, in considering the question, we must not travel beyond what is stated in the bill of exceptions, and the verdict pronounced by the Jury. And, in this view, although the pleadings were most able, I cannot help thinking that the learning and ingenuity of the counsel upon both sides have introduced matter not altogether relevant to this discussion, which, if the view I entertain of it be right, is but a short question. In the next place, I conceive that it is now a fixed rule in the law of Scotland, that it is quite unnecessary to libel malice in an ordinary case of slander; but that the proof of the words spoken, if falsely spoken, will be perfectly sufficient per se to infer malice. Whereas, if the alleged slander has been committed in the pleadings either of a Supreme Court, which is the most highly protected place we know except Parliament, or in the pleadings of any Inferior Court, or stated in confidential situations, or in a discussion in a public body privileged and entitled to hold such discussions, it is necessary not only to libel that the slanderous expressions had been falsely stated, but that they are also maliciously stated; and for this reason, though defamatory words, if uttered in a common place, would entitle the pursuer instantly to a verdict upon proving their utterance, yet, in a privileged place which warranted such a discussion, it might be necessary to prove that they were maliciously said. I am also clear—and I think my opinion is confirmed by every authority to be found either in Scotland or in England—that it is not necessary in cases of protection to prove malice by what is called extrinsic evidence; but that the Jury, in every such case, must judge from the expressions made use of, whether they could be justified by the place where they were made, and that it is enough for them to find that they were falsely spoken, and that also, in the circumstances of the case, they were maliciously spoken. Indeed I consider the whole doctrine on this subject so well illustrated by the charge of the Lord Chief Commissioner in the case of M'Lean *v.* Fraser, (Murray, Vol. III. p. 355,) that I shall refer to it as containing the whole doctrine which has been founded on by either of the parties in this case. It was an action of damages for words spoken in a Church Court.—'In reference to this case, (says his 'Lordship,) actions for slander may be considered as of two kinds. 'Either the defender has or has not a right to speak of the pursuer. 'If he has not, then he is liable, if the accusation is false. If he has 'the right, then he is protected, unless he maliciously make the ac- 'cusation. In the first case it is not necessary to state malice, as it 'is sufficient if falsehood and injury are proved; but, in the second,

'malice must be stated and proved, as it is the ground of the action. 'Whether a case falls within one class or the other, is a question for 'the Court; but whether malice is proved, rests entirely with the 'Jury. In the present case there is no proof of any grudge or act 'showing malice; but the proof of it is rested on the facts and cir- 'cumstances, and, according to your opinion of them, you will find 'for the pursuers or defenders.' Now, in the present case, it is admitted that the pursuer expressly libels upon the expressions complained of being falsely and maliciously uttered; and accordingly, in the first issue sent to the Jury, they are expressly desired to try whether the words there stated as having been used by the defender were false, malicious, and calumnious. The 2d and the 3d issues seem to me to have been prepared for the purpose of enabling the defender to justify his conduct, and to establish the veritas convicii by proving that the averments contained in the memorial were known to Dr. Hamilton to be false when he presented these papers. Now the Jury have rebutted the justification, and have found for the pursuer on all the issues. No doubt, although we cannot enter into the matter of fact, of which the Jury were the sole judges, we are entitled to consider whether the charge to the Jury was a misdirection in point of law, according to the circumstances stated in the bill of exceptions. It humbly appears to me, that neither of the grounds set forth in the bill, in the circumstances of this case, affords a good or a legal exception against the charge delivered. This leads me, however, to take notice of the Lord Chief Commissioner's charge. Indeed it is necessary for me to dwell upon it very shortly, not only to submit some views of that charge different from what have been stated, but also as necessary to explain the objections which occur to me as to the legal effect of the exceptions which have been made. The substantial part commences at the foot of page 13, and I conceive that the learned Judge, in the first part of it, laid down the law most distinctly and most accurately, and according to every case that has been decided, either in this country or in England. In an ordinary case of slander, it was not necessary to state more than that the words were falsely uttered; but that, in any question as to a protected place, both the summons and the issues must contain that they were not only falsely but maliciously uttered. And it is undeniable that the summons and issues are quite correct in this respect. Now, let me go down to the last and concluding part, at the distance of 18 lines. I shall afterwards consider those lines I have now passed:—'It was there- 'fore for the consideration of the said Jury, whether the words used 'by Dr. Hope, if they were said falsely of Dr. Hamilton, were also 'said maliciously, although there was no extrinsic evidence of the 'malice.' I conceive that under this final clause, which may be said to be the summing up of the whole charge, there are three propositions expressly stated to the Jury. 1. That it was necessary for

the Jury to consider if the words used were falsely used. 2. That, although falsely used, they must consider whether they were maliciously said. And the third proposition is, 'Although there was no 'extrinsic evidence of malice.' Now I conceive that this contains the whole sound and legal doctrine, both in this country and in England, with regard to words spoken in a protected place, that the words used must not only be falsely used, but must be maliciously used, and that the Jury are the judges of the malice, although there be no extrinsic evidence of the malice;—in short, that malice may be inferred from the facts and circumstances of the case, from the animus injuriandi, and from the words made use of being such as could not be justified by any place. And I conceive that this contains the sum and substance of Lord Gillies's charge in the case of Dempster v. Gilchrist, (see Borthwick, page 439,) which seems to have been held as a model by both parties, and in which I certainly concur. But, in so far as I can judge, the defender, in the two quotations I have made, seems to have obtained the benefit of every proposition laid down by Lord Gillies. In short, he leaves the animus injuriandi entirely to the Jury, which they would consider and apply in the whole circumstances of the case. To the doctrine, therefore, contained in the first and the last parts of the charge, it seems to me impossible to state any objection. Now I proceed to consider the parts objected to, beginning with the words, 'And accordingly the word maliciously was inserted in the issues, 'on which two observations arose,' &c. Now, here certainly the Judge did not say that this was not a protected place. It is true he said there was no evidence of the constitution of the Senatus Academicus, and nothing was proved to establish protection; and certainly there was no proof whatever upon that subject, which is all that he says. There might have been evidence led upon the part of the defender, showing that the Senatus Academicus was sufficiently constituted to try, to convict, and to punish any of its members for moral delinquency. If so, it should have been given in evidence. But when there are such disputes betwixt the Patrons and this Senatus Academicus itself, I do not think that it was an observation impertinent to the cause in the Judge to take notice that there was no evidence of the constitution of the Senatus; for although it may be known that there is a Senatus Academicus, and although the University returns a member to the General Assembly, yet it might perhaps have been right to have had some evidence, both as to the nature of its constitution, and the protection it affords. It were not sufficient to say that there was a Senatus. Their constitution, and their power to try such a question, might have been given in evidence. Nothing seems to be taken for granted in the Jury Court, as I observe that the issues in this case begin by stating, that 'it being admitted that the pursuer is Professor of Midwifery, and 'that the defender is Professor of Chemistry,'—facts surely more no-

torious than the constitution of the Senatus, and their power of entering into the discussion of the conduct and character of the individual Professors. I conceive that the fair meaning of the Judge must be taken, in the words just read, to have been this, 'that nothing 'was proved to establish protection; and that as to malice, if *that* '(i. e. protection) should be made out, it was for the Jury' to consider the malice in two points: 1. Because it seems to me hardly possible, either in common sense, or according to the fair meaning of the sentence, to apply 'that' to malice, without keeping in view that it was only where protection was established that his observations as to malice could apply. For instance, how could extrinsic malice apply to any thing but protection? Extrinsic evidence of malice was never heard of, and was totally unnecessary in any ordinary case, and applied solely to protection. But if I am right in what I formerly stated, and what has been uniformly stated on every Jury trial in this country, in so far as I know, as well as in England, that extrinsic or express proof of direct malice was not necessary, but that intrinsic or internal evidence might arise out of the facts and circumstances of the case, and out of the character and nature of the words used, then if the words used were impertinent, unnecessary, and not intended to forward the argument, but to insult and harass the feelings of the person to whom they were spoken, the Jury were certainly entitled to consider quo animo they were uttered, and whether they were to infer malice from them or not. In short, as the Judge's first observation upon extrinsic malice applies solely to protection, so I conceive that the second observation he makes as to intrinsic malice applies also to protection alone, and could not possibly be applied by the Jury in any other way, as the learned Judge had before told them that it was only in a protected case that it was at all necessary to libel upon malice. The Judge then proceeds. As to the first he remarks, that there was no extrinsic evidence of malice. And I fairly admit, that if extrinsic evidence was necessary, the exceptor would have been entitled to a new trial, because, if it was necessary, as the Judge has said it was unnecessary, the verdict could not have been supported. Then the Judge goes on: 'As to the second, intrinsic, or malice arising 'out of the circumstances of the case, and out of the character 'and nature of the words proved, it was a question for the said 'Jury, on the whole proof, to consider with what animus Dr. Hope 'spoke the words, and whether they were maliciously said.' Now this was applied only, and could only apply, to a protected case; because, if it were otherwise, it was not necessary for the Jury to consider with what animus Dr. Hope spoke the words, and whether they were maliciously said. And this, as he had stated just above, arose out of the facts and circumstances of the case, and from the character and nature of the words proved. If I am right in this view, it seems to me to be perfectly clear, according to every fair construc-

tion, that the learned Judge's observations, both upon extrinsic and intrinsic, apply solely to protection, and to protected places, and could not possibly apply to any thing else; and that the relative *that* can only apply to protection, to which he shows how malice, both intrinsic and extrinsic, is to be applied. The learned Judge then proceeds: 'He could not state to the Jury that this was a protected 'place. The words used were not protected by the place where 'they were spoken.' These words are the most inaccurate in the whole charge, and, as to their effect, my mind was at first left in some suspense and doubt. But I think I can see clearly what was the intention of the Judge, and how it may be reconciled both to the preceding and posterior parts of the charge, as to which I cannot see any ground of exception. Although the Judge had formerly explained that there was no evidence of this being a protected place, and certainly none had been led to that effect, yet every word of the charge proceeds upon the supposition that it was a protected place, and not one word which he has stated to the Jury would have been necessary in any other view; and therefore I conceive that perhaps it is but fair to construe the words consistently with every other part of the charge. And I beg, with great deference, to submit whether the Judge did not explain to the Jury what he meant, that he could not say from the evidence that this was a protected place, but that the words used were not protected by the place where they were spoken. And certainly there are many words which never could be protected by the place where they were spoken, however protected that place might be; and although no evidence had been led as to the nature of the protection, the Judge was surely entitled to say that these words could not be protected by the place where they were spoken, nor by any place whatever. Every word of the charge gives the defender the full benefit of the protected place, although the Judge certainly says that the words were not protected by the place where they were spoken, which just comes to this, that in a Senatus Academicus one Professor was not entitled to say to another that 'the fellow lies, and knows that he lies.' Now, if this be a misdirection in law, that the words used, as contained in the libel and the issues, and proved, were not protected by the place where they were spoken, then I would certainly concur in thinking that there was a misdirection in his charge.

But I can never conceive that any place, however protected, could warrant the use of these words, nor that the Senatus Academicus could have warranted them; and therefore I conceive, that even giving the utmost latitude of protection to the place where they were uttered, the words used were not protected by it. I really do not know any place that would protect the use of such language. Supposing that a respectable body of Professors, assembled to discuss, and believing themselves entitled to discuss, either the medical curriculum, or the propriety of the memorials presented by Dr. Hamilton

to the Patrons, I cannot conceive that the place where, on account of the characters present, every thing ought to have been conducted in a temporate and dignified manner, could possibly warrant the use of such opprobrious epithets as were found to be proved by the verdict on the first issue. Instead of forwarding the cause, the argument or the discussion in which they were engaged, I conceive it must at once put an end to all discussion. If the person to whom they were applied had been present, it must have led to immediate personal violence, be the consequences what they might, and put an end to all discussion. I conceive that the proceedings in a Supreme Court are entitled to a higher degree of protection than those of any other meeting, Parliament excepted; yet if it were possible to suppose, what I cannot conceive possible, that any gentleman, either in presence of the Court, or at a Faculty meeting, could apply such terms to a brother advocate, I conceive that the place, however protected, could not protect the words spoken, but that it would be held relevant to send the case to a Jury. Your Lordships will recollect the late case of Swinton *v.* Taylor, where language, very different indeed from what has been made use of on this occasion, although used in judicial pleadings, under feelings of great irritation, and of great suffering, yet, as it was not pertinent to the case, was found to be such that it could not be protected, even under such circumstances.* In the same way, in the case of Anderson *v.* Richardson, 13th June 1787, which was the case of a Professor giving advice to three of his students, and where it was pleaded that a Professor, in relation to his students, stood in the situation of a father or guardian, and was completely protected for what he said to them, Anderson brought an action before the Commissary of the district, libelling that Professor Richardson had injured his character, and that, in a conference with three students, he had mentioned that Anderson was a bad man, and a detestable member of society. The Commissary, on account of the confidential situation of the parties to whom this was communicated, assoilsied the defender; but the Court altered the judgment, and repelled the objection to the relevancy of the libel. This was certainly showing that no protection from confidential situations could warrant the use of such language and such slander; and yet I cannot help thinking that that was a much more protected case than the present. The Commissaries of Edinburgh found damages due by Dr. Duncan to this Dr. Hamilton on account of words spoken by him in this very Senatus Academicus, and in his class to his students; and this Court confirmed their judgment.† I do not mean to enter into the circumstances in the case of Scarlett, and of Forteath Williamson *v.* Lord Fife, and many others referred to by the counsel, all of which I consider to

* Ante, Vol. I. No. 71, affirmed 4th June 1824.

† Ante, Vol. IV. No. 280.

be well decided. In all of these cases, it was a question for the Jury, on the whole proof, to consider with what animus the person spoke the words; and it was therefore for the consideration of the Jury, as was stated by the Judge in the present case, whether the words used, if they were said falsely of Dr. Hamilton, were also said maliciously, although there was no extrinsic evidence of malice; and I cannot help thinking that in every part of this charge the defender had the full benefit of this being a protected place, although it was not sufficient to protect the words spoken. Now, in the House of Lords, in Lord Fife's case, it was asked in what manner the party had been injured by the charge; and it was laid down that it was absolutely necessary to state, not only what the misdirection was, but what it was that the Judge ought to have said. If the defender had wanted any explanation of the charge—if he had wanted the Judge to state whether it was a protected place or not, so as to admit of fair discussion—and whether, under such protection, real or believed, the defender was entitled to make use of such language—and whether it was pertinent or impertinent to the case, this ought to have been stated; and the Judge might have given his opinion to the Jury, whether, even supposing the place had all the protection which they claimed for it, it was not the duty of the Jury to consider the animus with which these words were spoken, even supposing the words had been used in a protected place. This is just what occurred in Lord Fife's case, where there had certainly been an inaccuracy in point of law. In this view, I call the attention of the Court to the exception taken, beyond which surely the party cannot pretend to go. It first states that the Judge ought to have directed the Jury to find a verdict for the said defender, on the ground that the discussion at the meeting of the Senatus Academicus, on the 23d of April 1825, was a privileged discussion, in which the defender was entitled to take part, and that the defender had confined himself to the proper subject-matter of that discussion;—that the expressions then and there used by the defender referred solely to the representation laid by the pursuer before the Patrons of the University, as to the manner in which the defender and certain of his colleagues discharged their professional duty—which representations were contained in the foresaid petition and memorials, then regularly under discussion in the Senatus Academicus. Now, although I have certainly great cause to regret that the charge of the Lord Chief Commissioner has not been so perfectly accurate as it usually is, so as to give rise to this long discussion, and which may be accounted for from the great fatigue of this trial, and from the charge having been delivered at four or five o'clock in the morning, yet I must say that his direction, with all the imperfections with which it has been charged, is more accurate and more legal, and more consonant to the practice both in England and Scotland, than what, it is insisted in the exceptions, he ought to have done. For if, instead of leaving to the Jury to consider

with what animus Dr. Hope spoke the words, and whether, if they were said falsely of Dr. Hamilton, they were also said maliciously, he had, on the contrary, adopted the words in the exception, he would have been depriving the Jury of the possibility of judging what was the animus with which they were used, and which belongs to the Jury alone—whether they were pertinent to the subject of inquiry—whether they tended to further the subject of discussion—and whether, if they were said falsely, they were also said maliciously. In short, I do humbly conceive, that if the Judge had adopted the very words insisted upon in this exception, it would have been a most illegal charge—a charge which could not have been justified; and I cannot conceive that this Court could have supported such a charge as is proposed in this part of the exception. But, then, there is a second ground for exception, which seems to me to be equally ill founded with the other, and likewise on the ground that there was no distinct proof of express malice given in evidence to make out a case of malicious libel. Now, in Lord Gillies's charge, and in every other charge that I have seen, it is expressly stated that no proof of express malice was necessary—that the Jury were entitled to infer that malice from the animus with which the words were spoken—whether they were pertinent or impertinent to the discussion—whether they were spoken with the view of forwarding the cause, or with the view of venting malice. If the Judge had stated what it is proposed he should have done in this second ground of exception, I should have conceived that it was totally erroneous in point of law—that extrinsic or direct evidence of malice was not necessary in that or any other case; but that it was the duty of the Jury to judge, in the first place, whether it was false,—and, secondly, whether, in the whole circumstances of the case, it was also malicious and uncalled-for, either as pertinent to the question, or as forwarding the discussion. It is on these grounds that I consider the exception not well founded.

Pursuer's Authorities.—Starkie on Libel, 241; 2. Starkie on Evidence, 862-883, 912, 3, 4; Gilchrist *v.* Dempster, (2. Murray, 471-8); Lord Gillies in M'Lean *v.* Fraser, (3. ibid. 365); Lord Gillies in Tytler, (3. ibid. 266.)

Defender's Authorities.—Starkie on Libel, p. 232; 2. Starkie on Evidence, 862, 7, 8, 9; 873-902, and cases referred to; Williamson, Nov. 18. 1819, (F. C.) and March 20. 1821, (2. Murray, 463); Tytler *v.* M'Intosh, (3. Murray, 244); Gibson *v.* Marr, (ibid. 258); M'Lean *v.* Fraser, (3. Murray, 353); Cooper *v.* M'Intosh, (ibid. 362); Gilchrist *v.* Dempster, (Borthwick, App. 439); Jekyll *v.* Sir John Moore, (Holt, 178.)

A. Goldie, W. S.—W. and A. G. Ellis, W. S.—Agents.

CASES

DECIDED IN

THE COURT OF SESSION,

SUMMER 1827.

K. MACKENZIE, Pursuer.—*D. of F. Moncreiff—Rutherfurd—Penney.*
W. FRASER, &c., Defenders.—*Jeffrey—Jamieson—A. Wood.*

No. 290.

Cautioner.—Parties having bound themselves as cautioners for a tenant, but stipulated that the landlord should exercise his right of hypothec before having recourse on them; and he having sequestrated the tenant's effects, but it being alleged that he had delayed to sell them—Held that the cautioners were liable.

May 12. 1827.

1st DIVISION. Lord Alloway.

KENNETH MACKENZIE of Dundonnell held a lease of the house, farm, and garden of Seabank near Inverness from 1815 to Martinmas 1822. Having intimated his intention to sublet them, Mrs. Fraser, with consent of her husband, Captain Fraser, (who was alleged to be insolvent,) addressed a letter, on the 14th of May 1818, to the agent of Mackenzie, offering to take a sublease at a rent of £135 per annum, payable at Martinmas, till the expiration of the principal one, and stating, that 'I shall find 'caution to your satisfaction, if required, for payment of the rent 'offered by me; and failing my doing so, I oblige myself to re-'move from the premises at Martinmas next.' Caution having been required, the following obligation was granted by the defenders to Mackenzie:—'Inverness, 26th May 1818.—We, Ed-'ward Fraser, merchant in Inverness, William Fraser, tacksman 'of Borlum, and John M'Tavish, writer in Inverness, hereby 'guarantee the rent of £135 offered by Mrs. Jean Fraser for 'Seabank, in manner stated in her missive,—the principal tacks-'man, Dundonnell, being bound to exercise his right of hypothec 'before calling upon us to fulfil this obligation.' In consequence

of this obligation, Mackenzie accepted the offer of Mrs. Fraser, stipulating that he should be allowed to retain possession of a servant's house till Martinmas then next—that she should preserve his growing crop from damage by cattle—and that a shed and a few articles of furniture should be taken at a valuation. None of these stipulations were contained in the original offer, and the defenders alleged that they had not been communicated to them.

Mrs. Fraser and her husband took possession; but a short time prior to Martinmas 1819, (at which term the first year's subrent was payable,) Mackenzie alleged that, seeing that it was not likely to be paid, he caused a petition for sequestration to be prepared, which he sent to the defender M'Tavish for revisal, but that it was returned with a note on the back of it, stating that he considered it premature and oppressive. This statement was denied, and no proof was taken as to it; but Mackenzie, assuming it to be true, stated that, in consequence thereof, he delayed to apply for a warrant of sequestration till the 30th of November 1819, when it was obtained and duly executed. He further alleged that he was induced, by remonstrances from the defenders, to delay proceeding to a sale; but these allegations were also denied.

On the 3d of February 1820, Mackenzie's agent wrote to the defender M'Tavish (who acted for himself and the other defenders) a letter in these terms:—'As one of the sureties to Dundonnell for 'the Seabank rent due by Captain and Mrs. Fraser, I beg leave to 'inform you that sequestration has been executed against them; 'and as this step has not produced payment, I have to request 'you will, on receipt, settle the rent due at Martinmas last, being '£135 sterling, exclusive of interest and expenses. If you and 'the other cautioners desire it, my constituent will give an assignation to his right of hypothec.' To this M'Tavish wrote:—'In reply to yours of yesterday's date, addressed to me as one of 'the sureties to Dundonnell for the Seabank rent, I beg to say, 'that I do not consider myself bound as such. A new bargain 'was some time thereafter made by Mrs. Fraser, to which the 'intended sureties were not parties,' &c.; and he therefore declined to pay the rent.

On the 26th of August 1820, Mackenzie obtained a warrant of sale, which he executed on the 29th of September, by selling off effects to the extent of £81. 17s.; but the sale of the rest of the effects was postponed, because (as he alleged) no offerers appeared. The sale was reported on the 5th of October, when a new warrant was craved; but this was resisted by Captain and Mrs. Fraser, and it was not obtained till the 21st of March 1821. It

was carried into execution on the 10th of April, when a horse (being the only article remaining on the ground falling under the sequestration) was sold,—the rest of the effects having been attached for Government taxes, or made use of by Captain and Mrs. Fraser.

In the mean while proceedings had been adopted to make effectual the hypothec for the second year's rent due at Martinmas 1820; and accordingly, in October of that year, warrant to cut down and secure the growing crop, and also to sequestrate the effects of the farm, was granted and executed. The greater part, however, of the sequestrated goods was carried off by the diligence of the servants for payment of their wages, after a competition with Mackenzie. On the 21st of January 1821 he obtained a warrant of sale, which he executed on the 13th of March; but there was only realized the sum of £8: 4: 1.

When the third year's rent became due at Martinmas 1821, Mackenzie alleged that there were no effects on the farm belonging to Captain and Mrs. Fraser; but, on the 11th of January 1822, he obtained and executed a warrant of sequestration, which was intimated to the defenders.

Soon thereafter he raised an action of irritancy and removing against Captain and Mrs. Fraser, alleging that they were more than a year's rent in arrear. The defenders were not called as parties to it; but it was resisted by Captain and Mrs. Fraser. Decree of removing was not obtained till the 2d of March 1822, when Mackenzie, in virtue of it, entered to possession. He then raised an action against the defenders, founding on the letter of guarantee, and concluding for payment of the rents, under deduction of such sums as had been realized by means of his sequestrations, and by resuming possession.

In defence it was maintained, That the guarantee was not applicable to the offer of sublease which had been accepted, seeing that the acceptance was clogged with conditions of which the defenders had not been made aware; and that, at all events, Mackenzie had not duly exercised his right of hypothec.

Lord Alloway found that 'the defenders guaranteed payment 'of the rent in question, and that there is not any condition in 'the acceptance by the pursuer to invalidate said guarantee; but 'that, by the letter of guarantee, the pursuer was bound to use 'his right of hypothec before calling on the defenders to fulfil 'that obligation:—that the defenders are entitled to insist upon 'the pursuer's having bonâ fide exercised his hypothec for their 'security; and that they will be entitled to be relieved from any 'part of the rent for which the pursuer had not used the ordinary 'means of securing and rendering it effectual under the hypothec-

'ation;' and appointed the case to be enrolled, to carry these principles into effect. In this interlocutor both parties acquiesced; and his Lordship, on subsequently hearing them, pronounced this interlocutor:—'In respect that the pursuer failed, for the first 'three years, to exercise his right of hypothec in the effectual 'manner which, from the condition in the letter of guarantee, he 'was bound to do, finds the defenders relieved from their respon-'sibility, and from the conclusions of the libel, in regard to the 'rents of these three years, and to that extent assoilzies the de-'fenders; but in respect the tenants, during the fourth year of 'the lease, left the farm unlaboured, and wholly displenished, so 'that no hypothec could be exercised, finds the defenders, under 'their letter of guarantee, liable for the fourth year's rent, being '£135 sterling, due at the term of Martinmas 1822, with the 'legal interest thereof from that term till paid; but under the 'deduction of such sums as the defenders can instruct that the 'pursuer either received from the landlord, or drew the benefit 'of, during that year's possession.'

Against this interlocutor both parties represented; and while his Lordship adhered so far as Mackenzie was concerned, he altered, and assoilzied the defenders in toto, 'in respect of the pro-'ceedings before the Sheriff, by which Captain and Mrs. Fraser's 'lease was irritated, in terms of the Act of Sederunt 1756, by 'the pursuer Mr. Mackenzie, and they were removed from the 'possession without the cautioners being even called in the pro-'cess; and the pursuer Mr. Mackenzie entered to possession of 'the farm, cultivated the same, and made an arrangement with 'the landlord, without the concurrence, knowledge, or approba-'tion of the cautioners.'

Against these judgments Mackenzie presented a petition; but, on advising it with answers, the Court adhered. He then presented a second petition, on considering which the Court appointed him to lodge a condescendence 'explanatory of the facts 'as to the delay in regard to the sequestration for the first year's 'rent, and also as to the extent of the effects sequestrated.' On advising that condescendence with answers, their Lordships appointed him 'to lodge a second condescendence, stating the spe-'cial facts which he avers and offers to prove in the event of the 'case being sent to the Jury Court, and also the pleas which he 'claims as competent to him in law.' A condescendence and answers, with notes of pleas in law* by each of the parties, were then lodged, in which it was maintained on the part of the pursuer,

* A note of pleas containing argument was ordered to be withdrawn.

1. That all that could be required from him was, that he should exercise bonâ fide his right of hypothec;—that it was not incumbent upon him to prosecute his diligence to a conclusion by sale with all the rigour and dispatch which the forms of law might admit of, and which of necessity would have been productive of ruin to the tenants, and so disabled them from paying the rents of the subsequent years; but that it was quite sufficient that he attached the effects by sequestration, so as to be enabled to assign that security to the cautioners; and,

2. That as the defenders had denied their liability at the very outset, and so had thrown him off his guard, they were barred from availing themselves of any plea arising from delay in the execution of the sequestration, even supposing that any such delay existed.

On the other hand, it was maintained by the defenders,

1. That it had been finally fixed as the law of the case, that they were entitled to be relieved from any part of the rent for which Mackenzie 'had not used the ordinary means of securing 'and rendering it effectual under the hypothecation;' and therefore, as he had been guilty of undue delay in exercising his hypothec, they were entitled to be assoilzied; and,

2. That as it was an essential condition of the obligation libelled on, that he should duly exercise his right of hypothec, he could not be relieved from the performance of that condition by any misapprehension of the defenders as to their liability under an obligation, the validity of which he maintained.

The Court altered the interlocutors, decerned in terms of the libel, and found expenses due.

Lord President.—The parties appear to be at issue on all the material facts of the case, and I think it should therefore be sent to the Jury Court.

Lord Gillies.—The whole question is, as to the meaning of the stipulation that Mackenzie should exercise his right of hypothec.

Lord Balgray.—Mackenzie has been extremely ill used by the defenders, and I am perfectly clear that the construction which he has put upon the letter of guarantee is the correct one. To exercise the right of hypothec means to apply to the Sheriff for and execute a warrant of sequestration,—the object being to create a security, so that it may be transferred to the cautioners. But the landlord is not bound to proceed to a sale. If he were so, it might be attended with the most ruinous consequences, and might utterly disable the tenant from paying the subsequent rents. I think that the interlocutor of the Lord Ordinary goes too far as to what is required in exercising the hypothec, and I am of opinion that Mac-

kenzie has duly implemented the terms of the condition by executing sequestration. But, esto that he was bound to have gone further, I think he has done so. Even if he had not, the letter from the cautioners, denying their liability, forms an important ingredient in this case. Mackenzie was thereby thrown off his guard, and was in so many words told, that, take what measures you choose against the tenants, we are not liable, which left him to his own discretion. Besides, the execution of the warrants of sale was resisted by the tenants, so that no blame attaches to Mackenzie.

Lord Craigie thought that the case was not sufficiently ripe for judgment, and that a further inquiry should still be made.

Lord Gillies.—I concur with Lord Balgray. This is a sublease, not for one year, but for several years; and as the cautioners were liable for the whole rents, the circumstance of not selling off the whole effects, and so removing the tenant, was rather in their favour than otherwise. A sequestration was executed, of which it was intended to give the cautioners the benefit, if they chose to take it; but they did not do so, and therefore the goods were sold. They continued liable, notwithstanding, for the subsequent rents.

Lord President.—On the law of the case I am perfectly of the same opinion. If the hypothec were to be exercised to the utmost, then there was no necessity for caution. The very purpose of having caution is to obviate the necessity of having recourse to that extremity, which would bring ruin upon all the parties.

Pursuer's Authorities.—Bell on Leases, 277; 2. Bell's Comm. 38; 2. Ersk. 6. 62; Macmillan, Jan. 21. 1629, (3390.)

R. Roy, W. S.—J. Macdonell, W. S.—Agents.

No. 291.

H. Gordon, Petitioner.—*Gordon—Lumsden.*

Mrs. Jane Duncan, Respondent.—*Jeffrey—Rutherfurd.*

Process—Expenses.—A petition for recall of an inhibition on a depending action having been refused, and thereafter the action having been abandoned, and a second petition for recall having been presented, but no extrajudicial application having been made for a discharge—Held,—1.—That such an application should have been made, and therefore the expenses refused, but the inhibition recalled of consent;—and,—2.—That it was incompetent to recall the former judgment, or to award the expenses of the first petition.

May 12. 1827.

2d Division.

F.

Shortly after the judgment pronounced (ante, Vol. V. No. 277.) in the application at Gordon's instance for recall of inhibition used by Mrs. Jane Duncan on an alternative summons of declarator of marriage and damages for seduction at her instance pending before the Commissaries, she gave in a petition to them, praying that her summons, which she considered defective in certain particulars, might be dismissed, (which was subsequently done,) reserving to

her to bring a new action. Gordon then gave in a petition to this Court, of new praying for recall of the inhibition, and also craving their Lordships to recall the judgment pronounced on his former petition, and to find him entitled to the expenses of the discussion thereon. The Court, of consent, recalled the inhibition, but refused, quoad ultra, the prayer of the petition, which they held to be incompetent; and they likewise refused to allow Gordon the expense of the present application, on the ground, that as the diligence fell by the dismissal of the summons on the dependence of which it was executed, it was only necessary to register a discharge in order to clear the record, and that he had never made any extrajudicial application for a discharge.

J. LYON,—FINLAYSON and BREMNER, W. S.—Agents.

J. BARBOUR, Pursuer.—*Thomson.*
A. GRIERSON, Defender.—*Skene—G. G. Bell.*

No. 292.

Process—Accumulation of Actions—Declarator.—The holder of a bill having raised diligence on it, of which a bill of suspension was refused; and having thereafter discovered a defect in the bill not pleaded in the suspension by the debtor, but which rendered the execution of the diligence dangerous, and having raised an ordinary action for payment of the bill, and thereafter a supplementary declarator to have it found that he was entitled to go on with his diligence—Held that such declarator was competent, and that no objection lay to it as creating an undue accumulation of actions.

May 12. 1827.

2D DIVISION.
Ld. Mackenzie.
M'K.

GRIERSON, the acceptor of a bill, having been charged for payment by Barbour, an indorsee, presented a bill of suspension, on the ground that Barbour was not an onerous holder; but he having, on a reference to oath, deponed that he was, the bill was refused. A caption was then taken out by Barbour; but having in the mean time discovered that the bill was written on a wrong stamp, and being afraid to execute it, he raised an ordinary action, concluding for payment of the sum contained in the bill, and founding on the bill and certain letters in support of his demand. After the record in this action was closed, it was sisted, on a suggestion of the Lord Ordinary, till a declarator should be raised by Barbour to have it found that he was entitled to execute his caption, notwithstanding the defect as to the stamp, on the ground that this objection should have been pleaded in the suspension, and was now excluded as competent and omitted.

Barbour accordingly raised a declarator with conclusions to this effect, in defence against which it was pleaded,

1. That there being already a suspension and an ordinary action in regard to the bill in question, the declarator was objec-

tionable, on the ground that it created an undue accumulation of actions; and,

2. That the proper form of trying the validity of a diligence or decree was to execute it, so that the party charged might bring a suspension.

To this it was answered,

1. That the declarator was merely supplementary to the ordinary action, in which this declaratory conclusion had been omitted; and,

2. That the validity of every right might be tried in the form of a declarator; and that a party who suspected that his diligence could not be safely executed, was not obliged to run the risk of an action of damages to ascertain whether it was valid.

The Lord Ordinary repelled these dilatory defences, and the Court unanimously adhered.

LORD GLENLEE. — The Lord Ordinary has given no opinion on the merits of the declarator, but has merely found that there is nothing to prevent the pursuer being heard on the demand there made. As to the first defence, it cannot be listened to; for, by the very narrative of the declarator, it is evidently supplementary to the ordinary action, the raising of which was sufficient to prevent the pursuer going on with his diligence also. In regard to the second, the general rule is, that any right may be ascertained by a declarator; and I do not see any absurdity in a party bringing a declarator to have it found that he is entitled to go on with his diligence, especially when the other party will not try the question by a reduction, or by a suspension as of a threatened charge.

The other Judges concurred.

W. DALRYMPLE,—R. WELSH,—Agents.

No. 293.

J. WRIGHT, Advocator.—*Jeffrey—Jameson.*
JANET WATSON, Respondent.—*Maitland—A. M'Neill.*

May 12. 1827.
2D DIVISION.
Lord Medwyn.
B.

THIS was a question as to a semiplena probatio in an action of filiation, which depended on the credit given to the witnesses for the pursuer. The Sheriff of Lanarkshire found that the evidence amounted to a semiplena probatio; and in an advocation the Lord Ordinary remitted simpliciter, and the Court adhered.

CAMPBELL and MACDOWALL,—C. FISHER,—Agents.

Mrs. C. MUNRO or ROSE, Pursuer and Advocator.—*D. of F. Moncreiff—Thomson—Jeffrey—Skene.*
G. ROSS, Defender and Respondent.—*Forsyth—Cockburn.*

No. 294.

Legitimation—Parent and Child—Marriage—Domicile.—A Scotchman by birth, who inherited a landed property, and succeeded to an entailed estate in Scotland, but who settled in England in early life, making occasional visits to Scotland for business and amusement, having, after about forty years residence in England, had a son by an illicit connexion with an Englishwoman, and having come four years thereafter to Scotland, accompanied by the child and the mother, where, after a residence of fifteen days, he was married to her; and having remained in Scotland for about two months, and then returned to England with his wife and child, where they resided till his death—Held, in a declarator of bastardy brought at the instance of the next heir to the entailed estate, that the son was legitimated by the marriage of his parents.

May 15. 1827.

2D DIVISION. Bill-Chamber. Consistorial. B.

THE late Alexander Ross was born in Scotland, in which country he inherited a paternal estate. In early life (about the year 1770) he went to London, and settled in business as an army agent. In 1787 he succeeded to the entailed estate of Cromarty in Scotland, and became a freeholder in two Scotch counties, after which period he occasionally visited Scotland for the purpose of attending elections of members of Parliament,—of visiting his friends, and of private business; but his constant residence was in London, where he married in 1777, and had a family of daughters. After the death of his wife, he formed an illicit connexion with Miss Woodman, an Englishwoman, by whom he had a son, the present defender, born in London in 1811. In spring 1815, Mr. Ross, accompanied by Miss Woodman and his son, came down to Scotland, with the intention of entering into a marriage there for the purpose of legitimating their son. They arrived at Newhaven on the 25th of May of that year, and having lived there in lodgings for about a fortnight, they were, on the 10th of June, regularly married by the clergyman of the parish, according to the forms of the church of Scotland. They then made a short tour in the north of Scotland, in the progress of which they visited Mr. Ross's estate of Cromarty, and resided at his house there for a few weeks, during which period he introduced the lady to his friends as his wife, and the defender as his son. They left Scotland on the 27th of August, and returned to London, where they continued to reside until the period of Mr. Ross's death, which happened in 1820. On this event, his son, the defender, took out a brieve from Chancery, for the purpose of having himself served lawful heir of tailzie to his father in the estate of Cromarty; whereupon the pursuer, Mrs. Rose, who was the

next heir of entail to that estate, and entitled to succeed on the failure of Mr. Ross without lawful issue male, raised an action before the Commissary Court, setting forth that she was nearest lawful heir of tailzie, and that the defender had taken out brieves, intended to interrupt and interfere with her in establishing her right to that estate; and concluding to have it found that the defender was born a bastard in England, and that he 'still is held 'and repute a bastard, and that therefore he is incapable of law-'ful succession, and has no title to any of the civil rights compe-'tent to lawful children.'

The Commissaries pronounced an interlocutor, which was acquiesced in by the parties, finding that the defender was the son of Mr. Ross and Miss Woodman; but, being equally divided in opinion as to the legitimation, judgment passed, according to the rule of that Court, in favour of the defender, who was accordingly assoilzied from the declarator of bastardy.

The pursuer having thereupon brought the cause before this Court by advocation, it was ordered to be heard before the whole Judges.

Argued for the Pursuer.—The only question before the Court is one of status. No question as to the right to a real estate could be competently tried in the Commissary Court; and although the cause of this action originates in a competition for the estate of Cromarty, which incidentally depends on the status of the defender, this question of pure consistorial law, competent only in a Consistorial Court, cannot be affected by that circumstance. It would be a most dangerous doctrine to allow the law of status to depend on whether the party's father has a landed estate or not. Suppose there were two sons, could the circumstance, that the succession to a Scotch estate would be regulated by the decision, induce the Court to make the eldest lawful, and the second a bastard, or the same person lawful as to a landed estate, and a bastard in respect to moveables left by his father to his eldest lawful son, there being confessedly no peculiar rule as to succession to landed estate, different from succession to moveable estate? This cannot be maintained, and this case must therefore be considered as it is in the summons, an action regarding personal status, without reference to the circumstances which may incidentally follow the result.

It is an admitted fact, that the defender was once a bastard, and it therefore lies on him to establish that he has been made legitimate by the subsequent marriage of his parents. The circumstances of the case are simple, and the parties do not differ materially in regard to them; but it is of importance for the pur-

suer to observe, that it is stated in the defender's Case that the sole object of the late Mr. Ross in coming to Scotland was to legitimate his child, and consequently that there was no purpose of taking up his residence here.

By the law of England, there can be no legitimation per subsequens matrimonium; and there being here, therefore, a conflictus legum, we must look for some principle for determining which law is to rule the case.

It is clear that it cannot be determined by the forum in which the question comes to be tried, although this seems to have weighed strongly in the mind of one of the Judges in the Commissary Court; and the first point truly of importance to be ascertained is the domicile of Alexander Ross at the birth of his child, at his marriage, and at the period of his death. The domicile here in question is totally different from that which is sufficient to found jurisdiction against parties in our Courts; it is the place of constant residence, ubi larem summamque fortunam constituerunt, and according to the law of which moveable succession ab intestato would be governed; and on numerous decided cases there cannot be the slightest doubt that Ross's fixed domicile was in England, by the law of which his moveable succession must have been regulated It is incumbent on the defender to show some definite rule and distinct principle by which his legitimacy is to be made out, and he must necessarily fix either on the lex loci contractûs, the lex rei sitæ, or the lex domicilii of the parents. The defender has deemed it enough to rest his case on the lex rei sitæ. But this is a question of status; the right of inheritance is merely an accidental circumstance, and the judgment must be the same as if no land depended on it, or as if the estate had been in England. Suppose there had been no estate at the date of the marriage, but only acquired afterwards, this subsequent acquisition could have had no influence on the legal effects of the prior marriage, though a question of inheritance would depend on the decision, as it does here; and indeed, if any point has been fixed by the case of Sheddan, it is this, that the situation of the property claimed cannot be the rule. In like manner, in the Strathmore case it was assumed that there could be no claim to the Scotch estate; and the claim of aliment made in this Court proceeded on the assumption of Bowes's illegitimacy. And in this case, too, we have it on the authority of the Lord Chancellor, that the case of Sheddan was not decided at all on the point of alienage. The lex rei sitæ, therefore, cannot be the rule.

As to the forum originis of the father, it can be of no weight in competition with his established domicile; and indeed it has

been lately held in the case of Pedie *v.* Grant, that it does not even found jurisdiction. The forum originis, as well as the other circumstances founded on by the defender as keeping up a connexion with Scotland, may all be important ingredients in ascertaining the domicile where that is disputed; and a man may perhaps more easily regain his original domicile, than acquire one elsewhere. But where the domicile is fixed beyond dispute, as it is here, then the forum originis, or the circumstances of mere connexion with a country, can be of no consequence, as their only use is to determine which is the true domicile when that is uncertain; but, the domicile being fixed, these circumstances cannot in the least affect the question of status.

But it is said that the marriage was contracted locally within Scotland; and this is in truth the only circumstance to distinguish this case from those of Sheddan and Strathmore, in the latter of which, although that point was left open by the Lord Chancellor, it was done in a manner which by implication excludes the defender's plea. Though the marriage here was in point of solemnity celebrated in Scotland, and so, as to its form, is effectual in both countries; yet, as to its operation, it must be held to be an English marriage, being contracted by parties domiciled in England, and subject to the law of England, but coming to Scotland, not to get the benefit of the Scottish *form* of solemnizing the marriage, but of the Scottish rule of law as to its *effects*. All the consequences of the marriage were to take effect in England; and that it is not correct to say that the legal consequences of marriage depend on the place where it is entered into, is established by the divorce cases in 1816, where marriages solemnized in England were found to be dissoluble in Scotland, notwithstanding the law of the place where they were contracted, which declares them indissoluble. If a Scotchman domiciled in Scotland marry in England, all the legal consequences attach to the status according to the law of Scotland, as the communion of goods, jus relictæ, &c. And the same holds in England as to Gretna Green marriages; the effects of such marriages take place according to the law of England, where the parties are domiciled,—and not the law of Scotland, where the marriages were contracted. The effects are all regulated by the law of the man's domicile; and so, if an Englishman marry in England, then come to Scotland, and be there domiciled, his estate and effects will be regulated, in regard to the interests of the spouses, by the law of Scotland. Marriage is in [illegible] gentium, and effect is always given to it, not [illegible] of the place where it is contracted, but of [illegible] where effect is to be given to it; and it

is on this principle that the Scotch divorces of English marriages are allowed; for the divorce cannot have place when the parties are not domiciled in Scotland. Divorce being the damage for non-implement of the contract, the remedy must be given according to the law of the country where it comes to be implemented, not of that where it has been contracted. The French case of Conti is one exactly in point to this. It was there held that the lex loci contractûs did not rule the case, but that the effect of the marriage in legitimating the offspring was to be regulated by the lex domicilii of the parents; and in our own case of Strathmore, while the Lord Chancellor no doubt reserves the question of a marriage contracted in Scotland, he couples that reservation with the further quality of the domicile also being in Scotland.

It thus appears that the rule of judgment cannot be found in the place of the situation of the estate—of the father's birth—or of the marriage; but it is to be found in the domicile of the parents, either at the birth of the child, at the marriage, or subsequent to the marriage. There is no occasion to prejudge the question, whether the domicile at any one of these periods would be sufficient, because in the present case the domicile was English at all of them. If the domicile were in Scotland at the birth and the marriage, the legitimacy would be clear, and nothing could alter the status. If the domicile were in Scotland at the marriage, but in England at the birth, it would still be a doubtful case. But here every point is against the defender, as there never was a domicile in Scotland from the time his father first left it.

If, again, the place of birth be taken as the rule, then the defender was born illegitimate, according to the domicile of his parents at that period, and he is incapable of being legitimated by the law of England. All the foreign jurists who write on general law are agreed that in questions of proper personal status, where there is a conflictus legum, the law of the domicile prevails; and where once the personal status has been established in the place of the party's domicile, it follows him all over the world, and cannot be altered without a violation of the principles of international law. Perhaps it will be contended that there may be a double status,—one legitimate, and the other illegitimate; but it is scarcely necessary to go into this, as here there was only one domicile. It will not be maintained that there is such a legitimacy here as would have enabled the defender to take his father's real estate in England, or even his personal estate ab intestato. It is said, however, that a double status has been sustained in England in the case of Birtwhistle. That, however, seems doubtful,

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as the decision appears to have proceeded on a peculiarity of the law of England as to succession to real estate, (independently of mere legitimacy,) that the person to succeed must be born in wedlock. The absurdities which would result from such a doctrine as that of a fluctuating status render it quite inadmissible, while, on the other hand, the law of the domicile can create no real difficulty. There have doubtless been nice cases as to what was the domicile of a party, but still there are always circumstances sufficient to determine it.

In the present case, the domicile of the parents in England at the time of the defender's birth creates an obstacle to his legitimation, which, when joined to the domicile being also in England at the period of the marriage, and subsequently till the father's death, makes it perfectly clear that his legitimation per subsequens matrimonium was impossible.

Argued for the Defender.—It has been said that this is an abstract question of status, not to be affected by any subsequent consequence which may result from the judgment; but it is in truth virtually a competition for the estate of Cromarty, and a question as to the capacity of the defender to inherit. The action is not a declarator of legitimacy by Ross, but of illegitimacy by Mrs. Rose, who has no title to insist in such an action, except on the ground that his legitimacy might stand in the way of her right to that estate, and on this she founds her title to insist in the action. The question at issue is, Did Alexander Ross, by his marriage in Scotland, legitimate his son to the effect of inheriting a Scotch landed estate? It is not a question of status in regard to a mere peregrinus unconnected with Scotland, except as being within its territory; it is in regard to a subject and citizen of Scotland possessing a landed estate here, and exercising the corresponding duties. It is asked, however, Of what use are these circumstances, if the domicile be in England? They are of importance, as showing that this is not a case of parties coming to Scotland to evade the law of England, but of a party having a landed estate in Scotland coming there for the laudable purpose of enabling his son to acquire a Scottish right, and not to take it back to England. It is not a question as to the power of testing in moveables, but as to the succession to an heritable estate—not as to status imported from another country, but whether the status of the parents, after the performance of an act in this country, had an effect on the status of their issue. And although, if we have no authority for determining the question in the law of Scotland, we must look to that of other countries, yet it appears that there are principles in the law

of Scotland sufficient for the decision of the case. It is laid down by our institutional writers, without any restriction, that marriage between parents legitimates children previously born, without allusion to the place of birth or the domicile of the parents, and under no limitations but those of mid impediments, as a marriage subsisting at the time of the birth, or intervening between that and the marriage. It is said that there is a third, viz. the status impressed on the child at its birth in England; and this renders it necessary to say something on the foundation of mid impediments. As to children born in incest, there can be no marriage; and as to adulterous children, a rule of policy prevents their legitimation, on the ground that it would hold out inducements to crime destructive to society, and to the peace of families. Then, as to intervening marriage, it is said that there is a fiction of law which supposes a marriage prior to the birth. The Novell of Justinian, however, says, that an intervening marriage shall not bar legitimation; and it was the Canon law which introduced the fiction, to prevent the children of the intervening marriage being deprived of their just rights. In Holland the Canon law on this point is not received. In France the intervening marriage does not bar the legitimation; but the children legitimated are held, quoad their rights, as younger than those of the intervening marriage. In Scotland there is no authority as to how the matter stands, and the question is still open, although certainly we would not allow the rights of the children of the intervening marriage to be defeated. It cannot therefore be said that we have adopted this fiction; but, admitting the fiction, still the birth and residence in England in the present case create no mid impediment; for although parties cannot marry in England, except in facie ecclesiæ, there is no admission in point of fact that Ross or Miss Woodman were never in Scotland or in France, or that they are not Quakers, who are permitted to marry by consent; so that a marriage was still *possible*, and it is only the *impossibility* of marriage that can exclude the fiction. What, then, are the grounds on which legitimacy is denied to this child? It is said that there are no grounds adduced by him in support of his legitimacy; but the onus lies on the other side to point out the principle of bastardy. There are, however, clear principles for supporting legitimacy on the part of the defender.

There are some principles which are admitted all over the world. One of these is, that, in regard to intestate succession to moveables, the law of the domicile prevails; another is, that deeds in reference to moveables are good, if according to the form of the countries where they are executed. But, in regard to

real property, the State having an interest in it, the lex rei sitæ is the universal rule as to transference and succession. On the other hand, it is greatly disputed what law is to regulate personal status, and whether a status once impressed by the law of the domicile is indelible, and follows the person wherever he goes. On the other side, all cases of personal status, being indelible, were given up, except marriage and legitimacy; and so the whole of the authorities, who all carry it much further, must be abandoned. But, even as to these, the rule produces the most absurd consequences. For instance, in Trinidad, now belonging to Great Britain, the law of Spain prevails, and by it a child may be legitimated by a public deed executed by the father. Now, suppose a Scotchman settles there, has issue by a black mistress, and executes a deed legitimating his son, could he be served heir to an estate in Scotland? It is impossible; and though this will necessarily produce a fluctuating status, yet the only thing stated on the other side is, that inconvenience would result from it; but this must necessarily occur in the conflict of different laws, and it will never be very great, as the precise limits are known; while, if the domicile be adopted as the rule, the inconvenience is increased in a great degree; for there is nothing so difficult as to fix the domicile, if there be no evidence of intention. And this brings us to the question of Ross's domicile, as to which there is really no evidence what was his domicile at the time when he was in Scotland, for evidence of intention then would take away the effect of all the previous circumstances; and it is this matter of intention which surrounds the question of domicile with difficulties, and shows that it would be quite absurd to make the domicile of intestate succession the regula regulans of cases of this nature.

But there is another principle not subject to such difficulties, viz. that every question as to landed succession should depend on the lex rei sitæ, because the State has the chief interest in the land; and is this to be disregarded in the most important question of all in reference to land,—the capacity to inherit,—because there is a previous question of status? It is not denied on this side that status is impressed by the law of the domicile of intestate succession, and that it accompanies the person wherever he goes. When he comes to Scotland, he is received like all other Scotchmen in the same situation. If he come an English bastard, he is a Scotch bastard; but he is so, subject to the law of Scotland, which will apply to him as to a Scotch person in the same situation, so that he is liable to be legitimated by the subsequent marriage of his parents. If the law were otherwise, the consequence would be, that a person would import not only his status, but the laws which

attach to that status in his own country; but there is no authority for such a doctrine. He imports his status into the country to which he comes; but he is subject to the law of that country, and every act done by him there must change his status, in the same way as would hold as to a party formerly living in the country. This is the principle of the divorce cases in 1816. Forbes and Levett were domiciled in England and Ireland; but the argument prevailed, that though they brought their status into Scotland, the act of adultery committed in Scotland must be followed by the consequences of the law of that country. Only two of the Judges expressed an opinion contrary to this, and they proceeded on the ground that there was a fraud against the English law; but the connexion with Scotland in this case shows that here there was no such fraud. These divorce cases were rested on policy and the manners of this country, and the same reasons apply equally to the case of legitimation as to that of divorce, and rule this case on the principles of equity. It is said, however, that in these cases the lex loci contractûs was disregarded. The argument founded on this is fallacious. The status was impressed in England, but the act of adultery being in Scotland changed the status, or rather gave a capacity of effecting a change; and in like manner, here, the status was impressed by the birth in England, but it is changed by the act of marriage in Scotland. The correct phrase is, not that the lex loci contractûs rules, but that locus regit actum. It is contended, however, that the effects of marriage are regulated by the law of the place where the parties mean to reside, and that the marriage here, therefore, must be held to be an English marriage. But it is to be observed, that marriage is not only a contract, but an institution. Its effects as a contract may be stipulated, and accordingly the patrimonial interests which are its effects as a contract are regulated by the presumed consent inferred from the place where the parties are to live. On the other hand, the effects of marriage as an institution are independent of the intention or will of the parties, and these follow according to the law of the country where the marriage takes place. It therefore affords a plain answer to the cases of Sheddan and Strathmore, when quoted as precedents here, that the act of marriage in these cases was not committed in Scotland. The French case of Conti is not one on which much reliance can be placed; but it supports one principle maintained on this side, that, as to real estate, the lex rei sitæ rules. As to the English case of Jolly, where a man married in England, and divorced in Scotland, was convicted of bigamy on a second marriage, it seems to have been understood that there had been collu-

sion in obtaining the divorce. In the case of Birtwhistle, the judgment of the King's Bench was unanimous, and it supports the rule of the lex rei sitæ. Then, as to the case of Sheddan, there was a specialty in so far as a question of alienage was involved; but besides, the marriage being in America, where legitimation per subsequens matrimonium is not allowed, the consequences necessarily followed according to the law of the country where the act was performed. The same distinction also held in the case of Strathmore; and as the Lord Chancellor expressly reserves the question, if the marriage had taken place in Scotland, it cannot be quoted as an authority in this case; and there being therefore no precedent against the defender's plea, and no principle to defeat the effect always given to a Scotch marriage, he is entitled to have the judgment of the Commissaries in his favour affirmed.

The Second Division having required the opinions of the other Judges in writing, written opinions were accordingly returned, three of which (those of Lords President, Cringletie, and Eldin) were against the legitimacy, but the others being in favour of the judgment of the Commissaries assoilzieing the defender, and the Judges of the Second Division unanimously concurring with these opinions, the pursuer's bill of advocation was refused.

The consulted Judges returned the following opinions.

Lord President.—In considering the very difficult and important question which occurs in this cause, extreme cases may be put, which are very revolting to one's feelings, and therefore it is the more necessary to endeavour to discover some clear principle which will solve the question.

On the one hand, if we suppose a Scotchman and Scotchwoman, both domiciled in Scotland, to have connexion, in the course of which the woman becomes with child, but is delivered of that child in the course of a temporary jaunt or visit in England, it does seem to be very revolting to say that such child shall not be legitimated by the subsequent marriage of the parents in Scotland.

E contra—If we suppose an English man and woman, both domiciled in England, to have an illicit connexion, the fruit of which is a child born in England, and the parties continue to be domiciled in England for thirty or forty years, during all which time the child is illegitimate, it does seem to be equally revolting to say that the parents, by stepping across the border, and marrying in Scotland, should thereby legitimate that child.

But I think there is a clear principle of the law of Scotland applicable to this case, whatever may be said of the above extreme cases, or of others which may be put.

I hold the facts in this case, as applicable to the status of the parties in other respects, to be clear.

1mo, The defender was born and domiciled in England down to the marriage of his parents.

2do, His mother, his only legal parent, was as certainly a born and domiciled Englishwoman at the date of her child's birth, and at the date of her subsequent marriage; and she has continued to be domiciled in England ever since.

3tio, As to Alexander Ross, the father of the defender, he was born a Scotchman; and, by inheriting and succeeding to heritable property in Scotland, he became subject to the jurisdiction of its Courts of Law, though it required a particular form of citation to bring him into Court; but in every other respect he was a domiciled Englishman. He had resided there, and there only, for 40 or 50 years. His visits to Scotland were not frequent, and of very short duration; and it does not appear that he had any establishment of servants in Scotland. He carried on a great business in England. In short, to every effect whatever (unless the present case shall be held to be an exception) he was domiciled in England at the birth of the child—at his marriage—and from that time to his death.

These are the circumstances of this case in reference to the personal condition of the three principal parties; and, by the law of the domicile of all of them, the bastardy of the defender was indelible and irreversible.

Now it appears to me that this directly points at a principle of the law of Scotland sufficient to rule this case; for whenever, by the law of Scotland, bastardy is indelibly fixed on a child, the subsequent marriage of the parents does not legitimate it. This is unquestionably the case, if the child be born in adultery, whether of the father or mother. I hold it also to be the case, though some lawyers doubt it, if the father or mother have entered into an intermediate marriage with a third person. But as to the first case of an adulterous bastard, it is quite fixed that such bastardy is indelible and irreversible, and that the subsequent marriage of the parents does not legitimate such child.

Now it appears to me that, by the comitas gentium, we are bound to give the same effect to indelible bastardy by the law of England, which we do to the same state by the law of Scotland. The first question we ask in Scotland is, Was the child born under such circumstances as to be in a capacity to be legitimated per subsequens matrimonium? If the answer be in the negative, then legitimacy will not follow. And I am of opinion, that if the same question be put as to a child born in England, and the answer be also in the negative, (as it must be in the circumstances of this case,) the result ought to be the same.

I have carefully considered all the authorities produced on both sides. Many of them push their argument too far, and many of them are founded on metaphysical subtleties; and none of them except one touch this identical case. But there is one which is directly in

point, and which is grounded on the principle I have laid down. It is the opinion of Boullenois, who is said to be a French lawyer of eminence, in which country legitimation per subsequens matrimonium is recognised as amply, or I believe even more so, than in Scotland. He says, vol. i. p. 62:—'J'applique encore cette décision à un 'enfant Anglois né en Angleterre d'un concubinage, et dont les 'pere et mere Anglois seroient venus demeurer en France, et y 'auroient été mariés sans s'y être fait naturalisés, parce qu'etant 'veritablement étrangers, et comme tels soumis aux loix d'An-'gleterre, leur enfant ne peut être, suivant ces loix, bâtard en An-'gleterre de naissance, et être regardé comme legitime en France, 'parce qu'il porte partout l'etat et la condition dont il est par les 'loix de sa nation.' This is the very case; and it appears to me to be solved on the only principle which will carry us through this case, and even through the extreme cases which I have supposed.

I cannot lay any stress on the circumstance that Alexander Ross, the father, was proprietor of a landed estate in Scotland; because the very same question might have occurred in a case of moveable succession, or even as to a landed estate of a third party, to which Alexander Ross and the heirs of his body were substitutes, and the succession to which had not opened till after his death. And I hold it to be quite clear—at least it is my decided opinion—that a different decision could not be given in those cases from what must be given in this.

If this defender be legitimated by the law of Scotland, he must be so to every purpose, and must take every right to which a legitimate child is entitled by our law. He cannot take the estate of his father, and not that of a third party, to which he may be equally heir; and he cannot take a landed estate, and not be equally entitled to moveable property.

Lord Cringletie.—I accede to the foregoing, so far as it goes. My own opinion is founded on the reasons in it, and some others in addition and explanation of the above.

It is unnecessary to prefix any statement of the facts out of which this question arises. These will be well known to those to whom the following is offered.

On the merits of this case, I have bestowed all the attention the novelty and importance of it certainly deserve; and the following are my ideas:

We have one point completely fixed by the cases of Sheddan and the Earl of Strathmore,—that a man domiciled in England, or in America, having an illegitimate child by an English or an American woman, marrying in either of these countries, and dying domiciled there, does not by such marriage legitimate the child.

The only difference, then, in this case is, that the late Mr. Ross, who, being domiciled in England, had an illegitimate son by an En-

glishwoman, domiciled there, came to Scotland, and married the woman there; and therefore the only question seems to me to be, whether the place where the marriage was celebrated can make any difference on the rights of the child. I think that jurists have gone too far, when they say that the law of domicile impresses on the subject qualities which are inherent to, and never quit him, in whatever place he may go to. But still it appears to me to be quite clear that the law of the domicile rules this case.

1. I am of opinion that the locus originis is a mere circumstance, and has no other effect than to cast the balance where other circumstances are equally weighty. A man born in Scotland, going to England, and being domiciled there, derives no right nor privilege whatever from his birth; and vice versâ with an Englishman. Of this we have a decided instance in the above-mentioned cases of Sheddan and Strathmore, in which it was ruled that a man domiciled where English law prevails, having natural children by a woman whom he afterwards marries in the same country, cannot thereby legitimate the children. 2. If either of these persons marry in Scotland, or in England, or in France, he derives no right whatever from the locus contractûs. The forms of the country where the marriage is celebrated must be observed in order to constitute a marriage, but that is all; when they return home, the law of the domicile will govern all the effects of the marriage. An English couple marrying at Gretna Green, and returning to England, obtain none of the privileges of Scotland, because they happen to marry there. On the contrary, suppose a domiciled Scotchman and woman, having natural children, to take a jaunt to England, merely as a trip for pleasure, and to marry there, I cannot for a moment doubt that such marriage would legitimate the children, because it would only call forth or produce a consequence belonging to the man and woman and children from the law of their domicile, which was dormant, and required only an actus solemnis to promulgate and give it birth; and this seems to have been the principle on which the French case of Conti was decided by the French Courts. In the same way, imagine that an English man and woman domiciled in England, and having natural children, come to Scotland, marry there, and return directly to England—I have not a conception, and indeed I have not heard it pleaded, that by such a marriage these persons could legitimate their offspring. From these premises I draw these conclusions: 1st, That the locus originis, in a question like the present, is of no importance; 2d, That the place of the marriage is of no importance; and, 3d, That it is the law of the domicile that must govern all the consequences arising from marriage; and that the law of the domicile of the mother must regulate the status and privileges of her natural children. Now I consider it to be admitted that the late Alexander Ross, though born in Scotland, went to England at an early period—that he became domiciled there—that he continued

to be so during his whole life—and that he died domiciled there. In that situation, his being born a Scotchman is of no consequence—his having an estate here is of as little, further than to constitute jurisdiction of Scotch Courts over him, to the extent of the value of that estate; but it did not make him a domiciled Scotchman. His having an estate here did not constitute Scotland as the spot 'ubi 'larem, penates, rerum ac fortunarum suarum sedem constituit, unde 'non sit discessurus, si nihil avocet; unde cum profectus est, pere-'grinari videtur, quod si rediit peregrinari jam destitit.'—(Cod. Lib. 7. De Incolis.) I hold this to be the true definition of a domicile. I hold that England was the seat of Mr. Ross's fortunes; and that, when he came to Scotland, he was travelling for a certain purpose, 'peregrinari visus est;' and when he returned to England, 'peregrinari destitit.'

But further, an idea occurs to me which was not mentioned at the pleading; and it is this, that natural children do not belong to the reputed father, nor do they take their domicile from him. They belong to the mother, whose domicile is theirs, and whose settlement, in case of poverty, is theirs. Now, the defender of this action was born in England of an Englishwoman domiciled there, and acquiring all his rights and all his disqualifications from her. By the law of England, he had no right to be legitimated by the subsequent marriage of his mother to his reputed father; and consequently the origin of Mr. Ross, or his having an estate in Scotland, is nothing to the purpose in a question of status of the defender, who is English by birth and by domicile; in proof of which, it must be conceded, that if the marriage had taken place in England, it would have had no effect in legitimating the defender. That is a point not to be disputed after the cases of Sheddan and Lord Strathmore, who were both Scotchmen. What difference, then, can it make, that the marriage was in Scotland, when the woman and her child brought with them the disqualifications attending on their domicile? The defender asks two things, viz. 1st, That he is to enter Scotland as an Englishman, and to become a Scotchman; 2d, To become a legitimate Scotchman. Put the case that the defender had been born of a Frenchwoman domiciled in France, in which case the child would have been a Frenchman; is it possible to allow that the reputed father could have brought the mother to Scotland, and, by marrying her, legitimate the child, to the effect of enabling him to succeed to Scotch landed property? No; he could not have done so; for although, by the law of France, legitimation per subsequens matrimonium is allowed, yet the stain of alien to Britain would have adhered to the boy from his birth. And in the same way, though the defender was born a British subject, yet the disqualification to be legitimated attached to him at his birth cannot be removed. I think that Lord Redesdale's idea in the case of Sheddan is correct, and equally applies to this one, that the law of England touched the defender at his birth; and the retrospective character of the law of

Scotland could not alter his status. I think that it is a decided point that the defender could not have been legitimated by his reputed father marrying his mother in England; that the place of celebrating a marriage is of no importance whatever in governing the effects of that marriage; and consequently nothing appears to me to be clearer than that the circumstance of the late Alexander Ross having married in Scotland can have no other effect than if the marriage had been celebrated in England. We see that legitimation per subsequens matrimonium is part of the law of France. The late Mr. Ross might have gone there and married; but would that have any more effect than if he had married in England? I think it would not.

The law of legitimation per subsequens matrimonium is certainly part of the law of Scotland, and it is no part of my province to alter it; but in cases of difficulty I do not think that an institution encouraging loose morals is entitled to any favour leading to a liberal interpretation.

Lords Mackenzie and Medwyn.—In this case brieves have been purchased from Chancery, both by the pursuer and the defender, to take up the succession to the estate of Cromarty. But as the pursuer can be entitled to succeed only in case the defender be incapable of succession, as being a bastard, the parties have stopped short to try that question under the present declarator of bastardy at Mrs. Rose's instance in the Commissary Court, which appears the proper form for doing so.

The points of law agitated in this case are new, and attended with difficulty as well as importance. But, on the whole, we are of opinion that the judgment of the Commissaries ought to be sustained, by dismissing the advocation.

The principal grounds of this opinion we shall endeavour to express briefly, without resuming at length the circumstances of a case in which there is not much dispute regarding the facts, and on which many opinions are to be given.

We think it clear that legitimation per subsequens matrimonium is a general rule of the law of Scotland, and therefore that the defender must be held to be legitimated by the marriage of his father and mother, which took place in Scotland, unless sufficient reasons can be assigned why his case shall be taken out of that general rule. We have then to consider the grounds attempted to be maintained to this effect by the pursuer of the declarator of bastardy.

(1.) It has not, we think, been argued as a reason why legitimation per subsequens matrimonium should be denied to children conceived in England, that the concubinage and marriage must be taken together as one course of action constitutive of legitimate filiation, and of which the whole must take place under the law of Scotland. And we do not think this could have been argued with any effect; for such an argument must rest on the idea that the law of Scotland regards concubinage with some favour or toleration more than

the law of England does, and holds out, as an inducement to parties for forming such a connexion, the possibility of afterwards legitimatizing any issue they may have. But we think this is certainly not the view of the law of Scotland. The law of Scotland regards concubinage as immoral and irreligious, and even criminal, and has no view whatever of favouring or tolerating it. But as this law is unable wholly to prevent concubinage, it allows legitimation per subsequens matrimonium, with the view, among others, of drawing the parties out of that state. In this respect, the law of Scotland is the same, we conceive, with the Canon law, from which it appears to have been derived, and similar indeed even to the Roman law, in which legitimation per subsequens matrimonium was originally introduced by Constantine, the first Christian Emperor, as a temporary law applicable to past concubinage only, and to children born before the date of the law only; and in which, even when legitimation was afterwards extended so as to include every case of concubinage, it was never allowed with any view of favouring or acknowledging concubinage as a legal or semi-legal state. It is the state of marriage, and not of concubinage, that is favoured:—'Tanta enim 'est vis matrimonii subsequentis,' says the Canon law, Craig, b. ii. tit. 13, § 16. 'ut de priori delicto inquiri non sinat, et illud omnino 'tollat et purget.' Setting this view aside, then, we see no reason why, in order to legitimation per subsequens matrimonium, the conception or birth of the child should be in Scotland, so far as relates to the interest or right of the father or mother. It seems sufficient that they stand in the illegal relation of father and mother of a child born without marriage, and are proper subjects of the law of Scotland, in order that this law may offer them the inducement to change this illegal relation into a legal one per subsequens matrimonium.

(2.) It is said that the legitimation of bastards in Scotland per subsequens matrimonium is founded on and limited by a fictio juris, viz. that the parents were actually married at the date of the birth, or rather conception; and that, when the parents were resident in England at the time of the conception and birth, this fiction cannot be admitted. We doubt whether the rule of legitimation by subsequent marriage was substantially founded on any fiction of that kind, or whether it be possible to limit the rule precisely by means of any such fiction. We doubt very much whether such fiction can be admitted to any greater extent than this, that when such circumstances have existed as would infer not only nullity, but even criminality by the law of Scotland in a marriage between the parents, if it be supposed to have taken place before the conception of the child, then legitimation is excluded. Thus, if at the conception either father or mother stood already married to another person, legitimation per subsequens matrimonium is excluded. But we doubt whether any other circumstance inferring simply incapacity of the parties then to marry would bar legitimation; as, for instance, the

insanity of one of the parents at the time of conception. Without determining that question, we hold it to be quite plain that at least the circumstances must be such, that in case the father and mother had married at the time of conception of the child, the marriage would have been void. Now, what circumstance of that kind exists in the present case? The presence of the parties in England surely is not such circumstance. Could they not have married in England, if they pleased, at the time this child was begot? Could they not have come to Scotland and married at that time as well as after? In the present case, we are not able to see the shadow of difficulty in the application of the fiction, taking it in the utmost force that can be imputed to it.

(3.) It has been argued that this mode of legitimation in Scotland is excluded by the unchangeable nature of the personal status of bastardy, which the bastard has acquired by his conception and birth in England, and brings with him into Scotland. It does not appear to us possible to adopt that argument. We do not think that an English bastard coming into Scotland could bring the English law of bastardy with him, any more than an English lawful son coming into Scotland would bring the English law of legitimate filial relation with him,—or an English father and mother, married or unmarried, could bring with them the English law applicable to their respective conditions,—or any more than a Scotch bastard, or lawful child, or Scotch father and mother going to England, would import with them into England a portion of the Scotch law for the regulation of their own rights. An English bastard coming into Scotland will be a bastard here, because his parents are not married; but his status here must, we think, be that of a Scotch bastard, not of an English one. On this point, the decisions in the late divorce cases apply a fortiori. For, in these cases, the argument was, that the indissolubility of the English marriage must continue in Scotland, not only because personal status generally continued when the person passed into another country, but, a fortiori, because the status of marriage was constituted by express contract made under the law of England, and specially fixing this indissolubility, and that this status could not be changed in this respect without violation of that contract. Yet this Court unanimously held that argument not to be good. After these decisions, we think it is impossible to receive the maxim, status personalis ubique circumferri, without such qualifications as will entirely exclude it from having any effect in this question.

(4.) It is said that the parties concerned here were not domiciled in Scotland at the time of the marriage, or after it; and, therefore, the law of Scotland ought not to be held to have affected their rights. Now, if this meant, and consistently with the facts of the case could mean, that the parties had no such connexion with Scotland as made their persons properly subject to its law, we think the reason would

be good why their personal status should not be affected by that law. But it is impossible, in this case, to make such a statement consistently with truth. Alexander Ross was a native Scotchman, who had gone to England in order to carry on business there, not in all probability meaning to end his days there, but continued to hold in Scotland a landed estate—continued to visit Scotland occasionally, and to exercise the rights of a Scotch proprietor and citizen; in particular, remaining liable to the jurisdiction of the Scotch Courts, so that, at any time, decree could have passed against him; and there was no occasion to cite him as a foreigner is cited. When this person came to Scotland, bringing with him his son, and the mother of his son, for the manifest purpose of subjecting himself and them fully to the law of his native land, in order that, under that law, he might marry the mother and legitimatize the son, so that the son might succeed as a Scotch heir to the Scotch landed estate; and when, for this purpose, he did marry the mother, after the regular form of the Scotch law, and acknowledge the son as his lawful heir, and did stay in Scotland for some months,—it does seem to us impossible to hold that he was not a proper subject of the law of Scotland. We cannot comprehend on what grounds he could pretend to say, or any body else to say, that, after all this had happened, this native Scotchman was still to be viewed as a stranger, on whom the law of Scotland ought not to attach,—who was to live here as if he had been a prisoner of war, or had been cast on our shore from a foreign vessel to-day, and was to sail away in another to-morrow. We think he was as much a subject of the law of Scotland, to all intents and purposes, as any man in that kingdom. Then, if he was so, his wife, who came there to marry him, and did there marry him, and there lived with him for some time after her marriage, must also have become a subject of Scotland; and her son, who also came to Scotland with her, and staid there in order to this very effect, must equally have been so. Suppose that on the day Alexander Ross left Scotland his affections had changed, and he had disowned this son, and the present defender had brought a declarator of legitimacy against him; could he have pleaded that he was a stranger, on whom the law of Scotland did not attach, and therefore, that though he had married the mother of his son, this son was not legitimated per subsequens matrimonium? Could such a defence have been sustained? It would not, we think, have been easy to sustain it; and yet, if that could not have been done, the plea of want of domicile can just as little be sustained now; for legitimacy once existing, cannot be lost. It is said that if Alexander Ross had died, then his domicile for intestate succession in mobilibus would have been held to have been in England. Perhaps it would. Intestate succession in mobilibus appears to be allowed to be regulated by one law, without division; and so the law of the country with which the defunct was most connected is wholly preferred, however much the

defunct may also have been connected with any other country. And that appears to be on the principle that he, dying intestate, may reasonably be presumed to have contemplated and intended that his moveable (or personal) property should descend by the law with which he was best acquainted, and the law of the country of which he probably considered himself as chiefly an inhabitant and citizen. It may be that, in regard to Alexander Ross, that country was England; and so his moveable succession, in case of intestacy, would have fallen under that law. But this can form no reason for denying that he was a person subject to the law of Scotland, so that, having married there, his marriage should affect him agreeably to that law. It is competent to any, even a native Scotchman, to settle his affairs, so that his principal domicile for intestate moveable succession may be in any foreign country, though he lives one half of every year in Scotland. But it would be strange, indeed, to hold that, during these residences, he was to be considered here as an absolute stranger, not subject at all to the law of Scotland, but encircled with a legal atmosphere of personal status brought with him from abroad.

We need hardly observe that one topic which has been urged in some cases is entirely inapplicable here, viz. that the actus legitimus was done in Scotland in fraudem of the law of England. Assuredly Alexander Ross had no view of defrauding the law of England. His object evidently was to give right to his son *as in Scotland*; and there can be no doubt that he bonâ fide intended to do all that the law of Scotland required for that purpose.

Lord Craigie.—So far as the Commissaries have decided in this case, in reference to the first branch of the summons, that 'the defender is the son of Alexander Ross and Elizabeth Woodman,' and 'that a marriage between these parties was regularly celebrated in '1815,' they appear to have exercised the jurisdiction committed to them; and the result of these two findings by the general law of Scotland would be, that the defender was the nearest and lawful heir of these parties, if not within the prohibited degrees of kindred according to the law of Scotland, and if nothing had intervened between the birth of the defender and the subsequent marriage, which could prevent such a union.

But, so far as the Commissaries proceed, in reference to the last conclusion of the libel, and to the brieve taken out by the defender for serving himself heir of tailzie and provision in the entailed estate of Cromarty, to inquire 'whether the defender is incapable of lawful 'succession, and has no title to any of the civil rights competent to 'lawful children,' the Commissaries have, in my opinion, exceeded the bounds of the jurisdiction committed to them.

Such a conclusion would have been imperfect and inadequate in a competition for the personal estate or executry of the defender's

father, and where each of the parties claims the office of executor qua nearest in kin. Until a confirmation had been obtained, no right would have vested in the successful party. But, in relation to the entailed estate of Cromarty, or to landed or heritable property situated in Scotland or elsewhere, the Commissaries appear to have no authority. The only question cognisable by them was, bastardy or not? Whether the pursuer, by preparing her summons in this unusual way, expected to derive some aid from the late determinations as to intestate succession in personal property, which is now held to be regulated by the law of the ancestor's permanent domicile at the time of his death, it is not easy to say. But if she did so, it is only necessary to examine those determinations, to see that they are truly adverse to her claims.

In this view of the case, the proper course would appear to be, to make a remit to the Commissaries, instructing them to dismiss the summons, so far as relates to the point already noticed, and to proceed further in the cause as shall be thought just. But if we are in hoc statu called upon and authorized to decide upon the rights and claims of the parties in relation to the lands and property of Cromarty, which at present is the only subject of competition or argument, I am humbly of opinion that the defender ought to prevail.

There is no longer any dispute as to the defender's filiation, nor as to the legality of the marriage between his father and mother, which was not collusive or simulate, but true and regular in all respects, and followed out in every possible way by the acts and deeds of the parties interested, and in all questions of status, so far as relates to the married pair. The question is, whether the defender's right, as the eldest son and heir of his father by the law of Scotland, is to be defeated by the law of England, if (what is not very clearly ascertained) his father had his general residence in England at the time of his death? In some part of the argument, the pursuer laid some stress upon the circumstance that the defender had been born in England, but that seems to have been given up; and rightly, the defender, before the marriage between the parties, being in the eye of law nullius filius, and having no interest in their status or domicile, while they had as little in his, except for the purpose of relieving the parochial funds of the expense of his maintenance.

It humbly appears to me that in such a case there can be no just or solid ground of distinction between the authority of the law of England, and that of any other kingdom or country in Europe, in which the defender's father or mother might have their residence at any particular period. By the treaty which united the two separate and independent kingdoms of England and Scotland, no such distinction was established, or meant to be established. On the contrary, while the laws respecting the general government and revenues of the united empire were as much as possible to be assimilated,

it was an express condition of the treaty—and, from the state of the legislative body as then constituted, it was most just—that no alteration should be made on the law of Scotland, even by the Legislature, (and most assuredly not by the Courts of Law in either country,) in matters of private right, unless for the evident utility of the people of Scotland. We are, therefore, to decide the point at issue as if the two kingdoms were still separate from each other, or as if it had occurred immediately after the accession of James the sixth of Scotland to the English throne; and if at that time the law of the ancestor's domicile (in the meaning lately affixed to this expression, that is, the domicile of *choice*, in opposition to those of *origin* or *birth*, or that which is attended to in ordinary questions of jurisdiction,) would not in the smallest degree affect the succession to his landed estates in Scotland, it ought to have as little influence at the present time.

If the question thus presented to us were to be considered as an international one, and to be governed by those rules which are observed between all or the greater number of civilized and independent nations on the footing of mutual comitas, and from the utility of having one common rule in transactions of a certain description, the result does not appear to be at all doubtful. It will be found, and indeed it was admitted by both parties, that while, in all the other governments of Europe, legitimation by a subsequent marriage was effectual, if there were no legal disability or mid impediment, the English alone had rejected it. For this an eminent lawyer and judge (Sir William Blackstone) has suggested many reasons, instead of the true one, as given by the English Parliament at the time. But this is of no importance, as Courts of Justice must be guided by the law as it stands, and without inquiring into the original causes, or even the expediency or justice of it. In these circumstances, there might be room for contending, in an English Court of Law (at least in reference to those individuals whose property in general is situated in other kingdoms,) that regard should be paid to what is the general law of Europe in such a case. At any rate, it is not easy to perceive a reason why, besides retaining their own opinions or prejudices in regard to the succession of landed property situated in England, the Judges in that country should attempt, or be held as attempting, to extend them to lands situated in another country, or in all other countries, where a different law has been long established.

But in the transmission of landed estates from the dead to the living, as well as with regard to the modes of constitution of land rights, there is no rule of international law or jus gentium such as has been already described. Instead of this, it seems to be established in all countries where there is a law of succession regarding land estates or rights, or burdens affecting such estates, that they are transmitted and constituted according to the law of the country

where the lands are locally situated. It is unnecessary to quote authorities on this point. The rule holds even in allodial subjects. But in lands held by feudal tenure, it is a necessary and unavoidable consequence from the nature of the right. As the right of succession in such property was a boon from the superior, it depended at first entirely upon his will, as expressed in the feudal grant. Again, when it came to be generally allowed, and if the course of succession was not provided for in the investiture, it was to be indicated by the law of the country, or mos regionis, and most certainly without any regard to the domicile of the vassal, either at the time of his death, or at any other period. The will of the vassal, although expressed in direct and positive terms, was not effectual, unless authorized by the superior, and in the forms prescribed by the public law; and least of all was it to be gathered from the law of the place where he might choose to reside.

In the early feudal ages, individuals held lands in different countries, subject to different superiors; and it was not unusual for the sovereign of one country to be a subvassal in another, and without any obligation to reside in any particular place, though all were liable to be called out to attend the superior in the performance of their feudal services. It would have been most extraordinary, therefore, if the vassal's preferring one country to another should entirely govern the course of his succession, in opposition to the general law of the country where the lands were situated. Not more than a century ago, the noble family of Hamilton, besides their Scotch estates, held an extensive territory, with the rank of Duke, in France; and it is believed they also had property in England; but it never was imagined that the representative of the family at the time, merely by preferring one of these three kingdoms as the place of his general residence, could alter the law of descent as it was fixed in the other countries.

In a question with regard to the effects of marriage, or of legitimation per subsequens matrimonium, upon intestate succession, it appears to be extremely doubtful how the doctrine of the domicile could be introduced to any extent. In matters entirely dependent on the will of the party, or to regulate the competency of actions in Courts of Law, some such rule may be necessary. But where the immediate and permanent interests of parties are involved, and particularly where those interests have become the warranted grounds of action in the Courts of Law, it seems quite unreasonable that the domicile of choice, as it is called—that is, the law of the place where the party is at any given time animo remanendi, should have a decisive influence; and it would lead to the most extraordinary and unjust consequences, if the status of a wife or of her children were made dependent on a tenure so precarious. By the marriage, if lawful where entered into, the rights of the man and wife are placed beyond recall by their joint will, whether directly or indirectly an-

nounced; and the relations and obligations between the parents and the children are, if possible, still less subject to the control of any one of them. If, on the day after the marriage, a son previously born, and in the possession of large property in Scotland, dies, could there be a doubt of its descending to his brothers and sisters, born, like him, before the marriage, and failing them, to any children the father might have had by other marriages, and this entirely without regard to the domicile of the father? In the same manner, might not a son or daughter previously born demand in a Court of Law, in every country in Europe except England, aliment as a lawful child? And would it be just that the father's removal to England, whether bonâ fide or fraudulently, should not only disappoint a just claim while the father remained in England, (if such should be the law there,) but that it should be rendered ineffectual where the child was acknowledged as a lawful child? In such a case, would it not be competent to attach any lands that might belong to the father in Scotland? Or might not arrestment be used jurisdictionis fundandæ gratiâ, so as to attach his personal estate in Scotland, and so render effectual the claim of the child? And if such are the rights and facilities afforded to children so situated during the life of their parents, are their rights of succession, after their parents' death, to be disappointed or evaded by their father's choice of a residence in a place where there is either no form, or an imperfect one, for giving effect to them? *

A learned Judge (Lord Gillies) put the question, quid juris, if, after the marriage, the husband had remained long enough in Scotland to create a domicile by residence? and the counsel for the pursuer admitted that it was a doubtful question. But, as it appears to me, this view of the case ought to be extended a good deal further. If, by the marriage, certain rights vest ipso jure in all the parties, can these rights be vacated merely by the husband's removing his person to another country, and the only one in the civilised world where the Courts of Law would refuse to interpose? If, in any other matter, a party should enter into an obligation which, though legal where entered into, is ineffectual to produce action in some other country to which he retires, was it ever heard that the creditor was to be precluded from legal redress or diligence in the country where the contract was entered into, and where the debtor became bound, and might be compelled, in the ordinary course of law, to perform all that was incumbent upon him?

In actions brought in the Courts of Law in Scotland, originating

* If, in virtue of the Cromarty entail, the defender had obtained a decree of irritancy or of devolution against his father, and had completed a feudal title, would it be competent to a son by a subsequent marriage, or any remoter substitute, to insist in a reduction of the decree and infeftment after the father's death, on the ground that the father's last domicile, animo remanendi, had been in England?

in transactions in foreign countries, the rule is, that actor sequitur forum rei. In this way not only an agreement will be sustained as a ground of action in Scotland, though not authenticated according to the lex loci contractûs, if it be agreeable to the Scotch form; but one that is not made according to the forms of the law of Scotland, or which is held to be extinguished by the law of Scotland, is altogether disregarded in our Courts, although it may be agreeable to, and still in force by, the law of the place where it was entered into. And as to the constitution or transferring of rights of lands situated in Scotland, while no writing will be sustained here, unless authenticated according to the law of Scotland, however formal it may be according to the law of the country where it was entered into, so an instrument executed in England, though ineffectual in point of form there, will be sustained in the same manner as if it had been framed in Scotland.

Thus, according to general principles, the present question ought to be determined in the defender's favour; and the late English decision in the case of Birtwhistle, so far as I have been able to obtain information, very strongly confirms this conclusion. The father was an Englishman, and had landed property in that country; but his residence for many years had been in Scotland, where he had purchased lands, and where also he had formed a connexion with the plaintiff's mother, whom he afterwards married in facie ecclesiæ. In Scotland he had his permanent residence, but he died in England, when his sister, as his heir by the law of England, took possession of the English property, the plaintiff being allowed, without dispute, to succeed to the Scotch estates. In an action of ejectment, however, in the English Courts, a decision was given in the defendant's favour, thereby ascertaining, that in succession to lands no regard was paid ex comitate to the law of the domicile; and consequently, where the case is reversed, and the lands in question are situated in Scotland, no regard ought to be paid to the law of England. It seems to be indisputable, that if in England legitimation per subsequens matrimonium is not admitted, even where the marriage had taken place in Scotland, and the parties had their residence in that country; so, with regard to lands in Scotland, where a different law has been established for centuries, the children of such a marriage are entitled to succeed.

It remains to consider the decisions and legal authorities to which reference has been made, as leading to a contrary result.

One class of these decisions relates to intestate succession in personal estate or executry, which, since the determination of Lord Thurlow in 1791, has been governed by the law of the ancestor's domicile; (see the words of the judgment of the House of Lords.) It has been contended that the intestate succession in landed property ought to be regulated in the same manner; but upon this subject, after what has been already said, it is unnecessary to offer any

argument. Indeed, upon looking at the different decisions, it will be seen that the distinction between the two cases has been at all times most distinctly marked. In the case of Hog *v.* Hog, 7th June 1791, Fac. Coll. p. 378, it is expressly admitted that 'landed pro-'perty must ever remain subject to the law of the territory.' In the case of Balfour *v.* Scott, decided in the House of Lords, 11th March 1793, where the question was, whether a person, taking as heir by the law of Scotland, could be required to collate, when claiming a share in the personal estate of the ancestor, who had his domicile in England? it was decided in the negative. But by the same rule, if the ancestor had been domiciled in Scotland, the heir could not have taken the moveable effects in England without being liable to collation. And if the ancestor had left nothing but lands situated in Scotland, his succession would have descended, without regard to domicile, according to the law of Scotland.

While on this subject, I may take the liberty of stating, that although, with regard to intestate succession in personal estate, the law must now be considered as fixed, there are individuals who greatly doubt the authority, as well as the expediency, of the rule so established. That it was rested upon international law cannot be asserted, the current of the decisions in Scotland for a considerable time having run in an opposite direction; Morris *v.* Wright, 14th January 1783. In its consequences it did most directly alter the established law in Scotland, by compelling the Commissaries to confirm as nearest in kin to a person deceased, his father and mother, and the representatives of deceased nearest in kin, who, by the law of Scotland, were excluded from the succession, and who are not, according to our law, nearest of kin to the deceased. In such a case, the interposition of the Legislature appears to have been necessary to justify such a distribution of the personal estate; but it was also necessary, 1. To give publicity to the establishment of such a rule. 2. To point out some short and simple form which should be effectual throughout the empire, and by which a party might counteract, in whole or in part, the presumption on which the rule is founded, if it should not be agreeable to his will; and, 3. To define more clearly the nature and extent of the residence which should govern the succession, it being almost impossible in many cases to discover it; e. g. where, from motives of pleasure or profit, a man divides his residence between Scotland and England, or where an individual, after having formed a domicile in one place, has left that place, and declared his purpose never to return, but to reside in the place of his nativity or elsewhere.

But however the law may stand as to succession in personal estate, it was never intended in the same manner to regulate the succession in landed property, whether situated in foreign countries, or within the ancient kingdom of Scotland, which, in such a question, must be viewed in the same light in which it stood in 1707. Nor could

such a decision be given without violating the conditions of the treaty between the two kingdoms, and at the same time shaking the security of the records respecting landed property in Scotland.

Inefficient and delusive these records would be, if the validity of the rights and documents there appearing depended on the animus remanendi of the successive proprietors, and upon the state of the law in those countries where they have established their residence, and which, to the Judges in Scotland, as well as to the parties in general, must be altogether unknown.

With regard to the other decisions to which a reference has been made, they do not apply. In the case of Sheddan, the parents had been domiciled and naturalized in America, and there they had been married, thus being subjected to the law of England, which, even after the political separation of the two countries, remained in force, unless where expressly recalled. The son, while his parents lived, was a natural son, having no claim as such, while his father and mother, with regard to his property and effects, were similarly situated. And the question truly was, Whether, after the death of his parents, from whom he could take nothing, he was at once to become a lawful child, so as to take lands situated in Scotland, in which he had never been, and where his parents had never formed any matrimonial connexion? On these specialties, as stated by an eminent counsel in the case of Strathmore, the claim was decided in the House of Lords. Had Sheddan's parents come to Scotland, and there entered into the obligations of man and wife, the case, as it appears to me, would have been viewed in a very different light.

Again, in the more recent case of Strathmore, the decision also rested upon special circumstances; and, according to the principles explained in the case of Birtwhistle, it might admit of some doubt whether the claimant could succeed to an English Peerage, although his parents had been married in Scotland. But as to a British Peerage, and still more as to a Scotch Peerage, I should greatly doubt whether the same determination could be given. In the case of a British Peerage,—that is, a peerage created since the Union,—there must be a collision between the laws of the two countries before the Union; but why, in such a case, there should be such a decided preference given to the law of England, I cannot readily discover. Particularly when the British Peer takes his title from a place in Scotland, and still more where he at the same time holds a Scotch Peerage, to which a reference is made in the patent, it would deserve consideration, whether, in point of construction, the later peerage should not be held to descend to the heirs of the more ancient one. With regard to a Scotch Peerage, the point appears to be clear indeed. Scotland never was a conquered kingdom; it was not annexed to England, but united upon equal terms, each country retaining its private and municipal rights in the fullest extent, if not expressly taken away. An individual, then, who in Scotland would

have been received as a Scotch Peer before the Union, must still be admitted to vote, and to sit in Parliament, if elected one of the sixteen Scotch Peers. In the case of one born in Scotland out of wedlock, but legitimated by a subsequent marriage in Scotland, to the effect of taking the landed estate of his family, I cannot see upon what ground his right of succession to a Scotch Peerage could be disputed, because, by the law of England, and in the case of an English Peerage, a different rule may prevail.

As to the foreign authorities, they may be dismissed in a few words. In the case of Conty, the marriage had been celebrated in England, and yet the children were held legitimate; while the authority of Boullenois is merely the opinion of an eminent lawyer in a hypothetical case, and that a very special one, from the want of naturalization, in consequence of which, it would appear that Boullenois thought that, by the law of France, the individual in question, having been born in England, would carry along with him the state and condition in which he stood by the law of England.

Again, in reference to the opinions of the ancient jurists, and the distinction between statuta personalia and realia, and with regard to personal privileges and disabilities, they either confirm the opinion I have formed, or are altogether inapplicable. The law of legitimation, if it had been introduced by positive statute, would, so far as regarded landed property, be considered as falling under the statuta realia; but with us there is no positive law on the subject. The law of legitimation by subsequent marriage is as much part of the common law of Scotland as that of primogeniture—the succession of males in preference to females, and of full blood to half blood. And to say that it may be disregarded, because the last proprietor had his domicile in England at the time of his death, seems to be as unreasonable as if it were proposed that a Scotch estate should go to the sovereign, as in Turkey, or divide equally among all the children, according to the law made in France during the Revolution, because the last proprietor died domiciled there; or that it should go to the youngest child instead of the eldest, because the ancestor was domiciled in the county of Kent, where that is the rule.

Again, as to the distinction pointed out respecting personal privileges and disabilities, much is to be found in the earlier writers which cannot be reconciled, and which seems to be founded upon no sound principle. It may be true that a privilege strictly personal, such as that of a peerage, cannot be exercised of right except in the territory of the sovereign by whom the dignity is granted; so, if a man is declared by a sentence in one country to be infamous, for an act in its own nature not inferring infamy, it will not be attended to in any other country. But the right of legitimacy which follows from marriage by the law of all the countries in Europe except England, and the colonies now or formerly parts of England, is not a personal privilege in the proper sense of these words. It arises from

the general law; it operates not only upon the state of the persons legitimated, but on the rights of their parents and relatives, and for them as well as against them. And as to the disability arising from minority, the period of which is different in different countries, it appears that, as in the case of actions brought in Scotland, a party will be held to be a minor or not according to the rules established in Scotland; so, in services and other proceedings relating to lands or real estates in Scotland, the same rule must be observed, although it may not be a rule in the place where the pursuer resides, or where the ancestor resided. But the inquiry is foreign to the present discussion. The question here truly is, whether a Jury of Scotchmen, and in a Scotch Court, ought not to find that the defender, the child of parents who were lawfully married in Scotland, without any restraint in point of propinquity or otherwise, and having no other children, is the nearest and lawful heir of his father in lands situated in Scotland? And to this, I think, there can only be one answer.

Lord Meadowbank.—Although the parties have not agreed altogether in the statements of the facts which they have respectively averred, I concur, nevertheless, with the Judges in the Court below, in being of opinion that the discrepancy between them is so immaterial as to render unnecessary any further investigation as to the accuracy of either.

Thus it is either proved, admitted, or not seriously denied, that the defender is the reputed and acknowledged child of Alexander Ross and Elizabeth Woodman;—that he was born in England while his parents were there residing in a state of concubinage;—and that neither of them, at the period of his conception or of his birth, were married persons, or within the forbidden degrees, or were under any circumstances whatsoever that could have prevented them from solemnizing a marriage betwixt them according to the rules of the law of Scotland; but that both were domiciled in England, and so situated, that in the event of either having died intestate, their personal succession would have been regulated by the law of that country—Elizabeth Woodman, on the one hand, not only having her only residence in England, but being a native of that kingdom, while Alexander Ross, on the other, although not a native of England, but a native of Scotland, had established his more permanent and usual residence in the former country. In like manner it is proved that, subsequent to the birth of the defender, these his reputed parents, being at the time subjected to the laws of Scotland, were married in and according to the rules and rites prescribed by the municipal and ecclesiastical laws of this country;—that previous to this marriage Mr. Ross had occasionally visited Scotland—had succeeded to two several estates within this kingdom—had been enrolled as a freeholder in more than one Scotch county, and that he and his wife having come to Scotland a few weeks before the solemnization of

their marriage, continued in it for some time afterwards;—that the defender accompanied his parents to Scotland—was with them at the time of their marriage being solemnized—and was from that period, both within Scotland and England, acknowledged to be their lawful child.

I also concur in the opinion on which the proceedings in the Commissary Court must have been founded, that the parties in this case having purchased brieves from Chancery to take up the succession to the estate of Cromarty, and it being clear that the pursuers can only be entitled to be preferred in that competition, if the defender, as being a bastard, be incapable of succession, they have proceeded in due and proper form in originating the present proceedings before the Consistorial Court, to try the question of the defender's legitimacy.

The terms of the judgment pronounced are also, in my opinion, correct and proper, and in no respect can be understood as determining any matter incompetent for the consideration of that Court. It has only been declared that the defender is a legitimate child, and 'capable 'of lawful succession, and having a title to all the rights competent 'to a lawful child;' and so determining generally, the Commissaries appear to me not to have exceeded the bounds of the jurisdiction committed to them.

I see no ground, therefore, for disturbing the interlocutor under review, either upon the principle of the proceedings being improperly or irregularly instituted, or of the fact being imperfectly ascertained, or the terms of the judgment being incompetent or excessive. And I have at length arrived at the conclusion, after giving the case that consideration which its novelty and importance required, that it ought also to be adhered to as being well founded in point of law.

This opinion is altogether independent of the fact of the defender's father having been born in Scotland, and of his having kept up some connexion with this country during his life. I should have viewed the case in the same light had Mr. Ross been born in England, and had no other connexion with Scotland than that arising, first, from his having possessed and left an heritable estate subject to the jurisdiction of the Courts of this country;—and, secondly, from his marriage having been contracted in Scotland, when, as a natural born subject of the Crown of Great Britain, he was, as living within the territory of Scotland, in every respect as amenable to the peculiar provisions of its laws and institutions, and as capable of acquiring rights and qualifications under them, as he would have been amenable to the laws and customs of England had he chosen to remain in England, and to have contracted marriage within the boundaries of that division of the empire.

In short, my judgment depends on this simple view of the case, that the defender's parents having, as natural born citizens of Great Britain, been in a capacity at the time of their marriage to subject

themselves to the peculiar laws and institutions of Scotland, and to the effects and qualifications thence arising; and having so subjected themselves by coming into this country, rendering themselves amenable to its jurisdictions, and solemnizing their marriage according to its laws, customs, and institutions, did thereby contract all the obligations and consequences which by them are attached to the state of marriage; and that one of these consequences being, that children antecedently procreated of such parents as may have afterwards married, and who were under no disability to marry at the time of their conception and birth, shall be thereby legitimated, it must follow that the defender is to be recognised as a lawful child, and his rights enforced accordingly.

To this, however, it has been objected, 1st, That as by the law of Scotland, whenever bastardy is indelibly fixed on a child, (as in the case of children born of an adulterous connexion,) the subsequent marriage of the parents does not legitimate that child; so the defender having been born in England of parents living in a state of concubinage, where legitimation per subsequens matrimonium is unknown, his bastardy must be held to be indelible, irreversible, and incapable of being removed by the subsequent marriage of his parents. 2d, That the parents of the defender having a domicile in England, by which their personal succession would, in the event of their dying intestate, have been distributed, both at the period of their marriage and after it took place, the law of Scotland, in matters connected with that event, cannot be held to have affected their rights, or to have governed the effects resulting from the contract. In other words, that it is to be considered as an English marriage, and dealt with accordingly.

Neither of these objections seems to me to be well founded.

In considering the first of them, it is important to keep in view, as a matter incontrovertibly established, that the rule admitting of legitimation per subsequens matrimonium is founded upon the principle that, in all such cases, the matrimonial consent, præsumptione juris et de jure, took place at the period of the carnal communication of the parents or conception of the child, which is therefore held to have been the true date of the nuptials. It disregards altogether the period of their declaration or solemnization, which is held and deemed to be nothing else but the mere evidence of a marriage having been contracted between the parties. Upon this ground it is, that there being no room for the operation of the principle on which the doctrine of legitimation per subsequens matrimonium is founded in the case of children born of an adulterous connexion, such children cannot be legitimated by the subsequent marriage of their parents; because, whatever a change of circumstances may have enabled them to do afterwards, at the time of the birth they could not have legally intermarried.

It may also be material to keep in view that the general rule

itself, and the exception just stated, prove that the law of Scotland admits evidence of the filiation to the father of children born in concubinage, so as to allow of their being legitimated, equally as it recognises the fact of their being children of the mother. Indeed, without such proof being admissible, there could be no legitimation per subsequens matrimonium at all. It is quite a mistake, therefore, to suppose, as seems to have been taken for granted, that bastards, in contemplation of law, belong any more to their mother than to their father. The difference is, that in the one case the fact of the filiation generally requires no proof—in the other it does; and although for certain purposes, and for a certain time, the mother is allowed the custody of the child, the burden of maintaining it is imposed upon the father whenever the filiation is established; but from neither the one nor the other does it acquire any public status or right whatsoever.

From these propositions it is to be inferred, that when the law of Scotland is called upon to determine any case of legitimacy per subsequens matrimonium, (the marriage within Scotland being admitted,) it requires no investigation in point of fact, excepting in two particulars;—first, the filiation of the child;—and, secondly, the condition of the parents at the time of its conception and birth, whether they were then free to have intermarried with each other, or whether they were incapable of forming that connexion. If these are established, it must follow that it cannot require or even permit any investigation into circumstances connected with the condition of the child; because that would be inconsistent with the principle on which the rule itself is founded, namely, that the parents were married when the child was conceived, and that it was born in wedlock, and came into the world with all the rights of a lawful and legitimate child. If so, to require an investigation into any thing with respect to its condition would be manifestly absurd, for its condition must in all such cases be dependent upon that of its father; and although, until the solemnization or declaration of the marriage of the parents, it was reputed a bastard, that reputation was incorrect and contrary to the fact. No doubt the child was apparently a bastard, because there was no external evidence of the marriage of the parents; but, fictione juris, the marriage had taken place; and from the hour when that evidence was made manifest by the subsequent marriage, in contemplation of law he was regarded as a legitimate child, with all the rights and privileges belonging to that status.

In this situation, and in a question of this kind, it seems of no importance whatsoever where the child may have been born, provided his parents, at the time of his conception and birth, were natural born subjects of the Crown, and capable of subjecting themselves to the peculiar institutions of the law of Scotland—could have contracted a marriage—and did afterwards legally declare or solemnize their marriage within its territory. Accordingly, I

do not find in any book on the law of Scotland the slightest authority for giving countenance to the doctrine that an inquiry can be instituted into the condition or the situation of the child, either at his birth or during his life, or into any thing else but the filiation and the condition of his parents. The capacity of the child to be legitimated never enters into the discussion. It is the capacity of the parents to have intermarried that forms the subject of inquiry. Indeed, I observe it to be expressly laid down in the notes which I possess of the Lectures of one of the highest authorities in the law of Scotland, (Mr. Baron Hume,) that, if a son born in concubinage shall himself marry, and shall die, leaving children, before the marriage of his parents, yet, if his parents do afterwards marry, his children will become entitled to all the rights of the lawful descendants of their grandfather, as if their own father had been born in wedlock.* In that case, however, the son born before the marriage of his parents must have lived and died with the reputation of a bastard, and with that character indelibly and irreversibly, as it so happened, stamped upon him during his whole life. Yet the power of the principle upon which legitimation per subsequens matrimonium is founded is so invincible as, in such a case, it would seem, not even to admit of an inquiry as to whether the apparently indelible bastard was living or dead at the time of the marriage of his reputed parents, but simply whether he was their child, and born at a time when they could lawfully have intermarried.

In the present case, therefore, it humbly appears to me to be of no importance that the defender was born in England, because, if his filiation be admitted, or not seriously denied, or proved, which it is, and there was nothing at the time of his conception and birth to have prevented his parents from legally intermarrying in Scotland, and they did afterwards so intermarry—then, provided there is no principle in the law of nations which could prevent all the consequences of a Scotch marriage from legally attaching to them, no effect would be given to, or inquiry permitted respecting his apparent condition at the time of or subsequent to his birth. Fictione juris, the law must hold the true date of the marriage of his parents to have been that of his own conception or birth, and not that of its solemnization or declaration. Although the defender was, therefore, no doubt reputed to have been born a bastard, that reputation was false; for his father and mother, on the contrary, as has been since proved by the ceremony performed by the clergyman, were truly at the time of his birth married persons, and he himself was a legitimate son. In short, the defender (to use the expression of the civil law in such a case) natus erat, et non factus, filius legitimus.

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* To the same purpose, see Voet. Lib. xxv. tit. 7, § 7.

A case was put, that the defender had been born in France of a Frenchwoman, living in concubinage with a domiciled Scotchman, in which case it was said he would have been born a Frenchman and an alien, and that, as no subsequent marriage could have taken off the stain of alienage, neither could it have removed the stain of bastardy.

But, upon the grounds already stated, I must be humbly of opinion that, upon any view of the law, the determination of such a case would have been directly the reverse of that which was assumed. For, in the first place, the father is supposed to have been a Scotchman, with his domicile in this country. 2dly, The child was born under a system of law admitting of legitimation per subsequens matrimonium, and with no indelible stamp of bastardy affixed to him by the law of the place of his birth. 3dly, The marriage of the parties was contracted in Scotland.

Now, it seems to have been forgotten that, from the moment of the marriage, the status of the mother merged in that of the Scotch husband, and her stain of alienage was thereby immediately removed. Accordingly, it has never been questioned that a woman so situated is, in the event of her husband's death, entitled to her terce, and to all the other rights competent to a native Scotchwoman. And so, in the case of Jankouska against Anderson, Nov. 25. 1791, where the tercer was a foreigner who had been married to a native of Scotland, this right was not disputed. The marriage, and the rights arising under it, were therefore, if questioned in the case supposed, to be considered in the same light as if both the parties had been natural born subjects of Scotland; and it being an inherent qualification of such a marriage, that the children born before it was solemnized or declared became thereby legitimate, and there was no impediment, from the mother at the time of the child's birth being an alien, to the operation of the presumption that the true date of the marriage was that of the conception of the child, I cannot doubt that a child so situated could no more have been regarded as an alien, than if the parents had been actually married in the face of the church of Scotland before its birth, within the realm of France.

In short, the whole doctrine of the indelibility of the bastardy of the defender, arising from the fact of his birth having been in England, must be rested upon the principle of there having been something at that period existing in the situation of his parents respectively, and as regarding each other, which would effectually have precluded them from contracting a marriage in Scotland, followed by all the rights and consequences of a Scotch marriage. For, if there was no such impediment, the defender, in fact, never was a bastard, and therefore never could have that status indelibly impressed upon him.

2. But as it is not alleged that the late Mr. Ross and Elizabeth Woodman were situated, either by their being married persons, or within the forbidden degrees, so as to have rendered their intermarriage in Scotland illegal at the period of the defender's birth, and as it cannot be pretended that their being domiciled in England could have presented a bar to their forming that connexion, it is to be considered whether there be any solid ground for the second objection stated to the legitimacy of the defender's birth, viz. that at the time of the declaration or solemnization of their marriage, they, having had such a domicile in England as would have rendered their personal succession liable to distribution under the provisions of that law, were thereby incapacitated from contracting a marriage in Scotland, accompanied with, and drawing after it, those different rights and consequences which, by its principles and policy, are deemed to be inherent in the contract.

But the principles regulating the distribution of personal succession are altogether different from those which apply to questions relating to marriage and the rights flowing from it. In the former cases, the presumed or implied will of the deceased, in the absence of his expressed will, forms the regula regulans for determining all such questions; and from its being held to have been his intention that his personal estate should descend according to the rules of that law, with which, from his residence under it, he is supposed to have been best acquainted, that of his domicile is justly fixed upon as the law by which it is to be distributed.

It is obvious, however, that even if such questions as the present could be determined by the will of the parties, there would, by its application to them, be a strange inversion of the principle on which alone it is made to operate upon cases of intestate succession. For in the latter the implied will of the parties is only had recourse to, when legal evidence of the actual will is awanting or defective; but in such cases as that now under consideration, it cannot be alleged that there is ever any doubt of the parties having, in a manner sufficiently formal and authoritative, declared their will and intention to have been in direct contradiction to that which, by the supposed implication of the lex domicilii, the Consistorial Court is required to give that effect to. Thus it is, with all deference, in this case, impossible to dispute that, by their leaving their domicile in England—coming into Scotland—solemnizing their nuptials according to the law of Scotland—and by their afterwards acknowledging the defender as their legitimate child, his parents as expressly declared their will and intention to have their marriage deemed and taken to be a Scotch marriage, and to have it accompanied and followed by all the obligations, rights, and consequences of that contract, as in a case of personal succession could have been afforded by the most regular and formal testamentary deed.

But indeed the rights consequent upon the matrimonial contract are totally independent of the will or intention of the parties.

'Foreign Courts,' it was observed by the Lord Ordinary in the case of Gordon against Pye, 'are in such cases nowise called upon 'to inquire after that will, or after any municipal law to which it 'may correspond. They are bound to look to their own law; and 'it is, with all deference, thought to be in a particular degree con-'trary to principle, to make that law bend to the dictates of a 'foreign law in the administration of that department of interna-'tional jurisprudence which operates directly on public morals and 'domestic manners.' And it cannot now, after the judgments in that and similar cases, be doubted that this is the principle which governs the law of Scotland.

But if the intention, or presumed intention of the parties is altogether excluded in such questions, there has been no legal principle shown upon which the lex domicilii should be allowed either to control or to affect them.

The principle of personal disability, arising from the particular law of the domicile, to enter into the contract beyond its territory, is disclaimed. Indeed, the notion of personal disabilities so attaching themselves is clearly and obviously untenable. It no doubt was at one time entertained; but the doctrine has long been allowed to be inconsistent and absurd, and is exploded by the best public jurists. At all events, the decisions of this Court in the cases of Gordon against Pye, and others since determined, have fixed that such a principle is not admitted into the law of Scotland.

The only ground, then, relied upon for giving effect, in the present case, to the lex domicilii is, that the different obligations of the contract having been intended by the parties to be executed under the law of the place of the fixed and permanent residence, it is by it that its nature and extent must be regulated. But this view, it is obvious, just reverts to the implied intention of the parties (and that, too, in direct opposition to their formally and legally expressed intention) to limit the extent of the contract, by that which is to take place after its obligations have been incurred, and those rights which regard not themselves only, but their issue, fixed beyond the reach of any will of theirs to alter, infringe, or control them.

Accordingly, there is no book on the law of Scotland which lays it down that such questions are to be determined by the law of the domicile; and it is therefore impossible for me, not only in the absence of all such authority, but in opposition to the principles laid down, after the most solemn consideration, in the cases of divorce brought in this country by parties married in England, and before taken notice of, to rest upon a ground for guiding my judgment, which seems so inapplicable to the nature of the question,

and which would lead to consequences so irreconcileable to justice.

But indeed other cases besides those just referred to have occurred, which seem to go a great way in proving that questions of this nature are not regulated by the law of the domicile, either here or in England.

Thus, persons in minority cannot, without the consent of their legal guardians, validly contract marriage within England. It is, however, matter of settled law, that if such parties come into Scotland, subject themselves to the law of this country, and contract marriage, such marriages are binding and effectual in England, and all the world over. But I am at a loss to see how such marriages can be acknowledged without taking along with them all the effects resulting from the law of Scotland, by authority of which they have been entered into, and by the operation of which alone they are held to be binding. For instance, suppose that an English minor, domiciled in England, has a child born in concubinage in Scotland, and thereafter marries in Scotland, retaining his domicile in his native country—on what principle could a Scotch Court refuse to hold that child to be legitimate? Not upon the principle of the child having been born in a state of indelible bastardy, because, being born in Scotland, by the law of its birth, if it carried any thing, it carried along with it the inherent privilege of being capable of legitimation per subsequens matrimonium; and still less upon the principle that the marriage of the parents (considering it as an English marriage, because in England the objects of the contract were to be carried into execution) could not be attended with the effect of rendering it legitimate, for in England there could have been no marriage; and it is impossible to proceed upon a presumption of that having taken place which never could have taken place. In short, if the law of England had followed the parties, and they had continued subject to that law, upon the principle of their being strangers in Scotland, the result would have been, that the pretended marriage was a nullity altogether. But although the law of their domicile, it not only did not follow them to the effect of preventing, or of affording grounds for dissolving their marriage, but the marriage by it was as valid and effectual as if the parties had been major, and the ceremony performed in England in the face of the church.

Upon no principle, presumption, or fiction, therefore, could the particular limitations and restrictions of the law of England, as it appears to me, have been appealed to in such a case as that which is here supposed. On the contrary, if it be clear that it could not in such a case have affected the marriage itself, it seems impossible to allow it to operate so as to alter the nature of that contract, or to control its inherent qualifications, which, presumptione juris et

de jure, became binding from the moment of the commixtio corporum, and not from the period of the solemnization.

One other illustration may be given of this matter, by putting the case in another point of view.

By the law of Scotland, fornication is a criminal offence, and has been formerly more than once made the ground of criminal prosecution. Now, put the case that an indictment for that offence had been raised against the late Mr. Ross and Elizabeth Woodman, who certainly lived for some short time in this country in a state of concubinage, and after their marriage they had been brought to trial before the Court of Justiciary—can it for a moment be doubted but that the defence of these parties, founded upon their subsequent marriage, would have been insuperable? and that, if the prosecutor had rested on their domicile, as taking off the inherent qualification of the contract, his plea upon the principles recognised and enforced in the cases of Gordon against Pye, and others of the same description, must have been repelled?* The Court must have held that the crime had never been committed, because the true date of their nuptials was that when the first carnal communication betwixt them took place. Yet this defence would have rested entirely on the principle of the civil contract having the effect which the defender contends for at present; and it would be a strange anomaly to hold that this view must have been successful in the Criminal Court, while in the Civil it is to be altogether laid aside. This, however, I apprehend is out of the question; and if the defence of the defender's parents in the case supposed must have been sustained, his in the present cannot be allowed to suffer a different fate.

But I am inclined to take still another view of this question. The principle of legitimation per subsequens matrimonium, which is admitted and recognised by the law of Scotland, is likewise admitted and recognised by the Canon law, and (it has not in the pleadings been denied) by the laws of every Christian country in Europe, with the exception of the laws of England, the Legislature of which has thought fit, by a local regulation, made even in contradiction to the rules of their own church, to restrict within their territories the operation and effect of the matrimonial contract. But marriage is a contract juris gentium, to which, by the law of all nations, certain obligations, rights, and consequences are attached; and it would seem that the qualification of this public right now under consideration may be fairly considered as part of the public law of Europe. Now, although it may be quite competent for England, or for any state, to restrict those obligations, rights,

* Tanta enim est vis matrimonii subsequentis, ut de priori delicto inquiri non sinat, et illud omnino tollat et purget.—Craig, b. ii. tit. 13, § 16.

and qualifications with reference to the contract as entered into within their own territory, I am inclined to be of opinion, that as personal disabilities do not follow individuals extra territorium, foreign Courts (and, above all, such a Court as the Consistorial Court of this country, the Curia Christianitatis) cannot hold that, by some kind of implication not explained, and contradicted by the fact, such restriction is to control the obligations, consequences, and qualifications of a contract juris gentium, entered into in a territory where no such exception is allowed. If it was, results the most extraordinary and revolting would occur. Thus, in some divisions of Germany, marriages (ad legem morganaticam, or ad salicem) are allowed to be contracted by certain classes, which have all the effects of the most regular matrimonial contract, except that the parents, by an agreement, are entitled to exclude the children nascituri from all right of succession, as legitimate children, at least through their father. Now, put the case that a Scotchman, having his domicile in any of these countries, is raised or succeeds to a situation where such a privilege would be allowed him;—that he marries, and his children nascituri are in legal form excluded from the rights of legitimate children;—that children are born of the marriage, which is afterwards dissolved by the death of the mother—a second marriage, without any such limitation, is contracted by the father, and a second family is born—thereafter a competition arises betwixt the eldest sons of the two marriages for an estate tailzied upon the heirs-male of the father, and situated in Scotland—I cannot conceive that there could, in such a case, be the slightest doubt that, in this country, the child of the first marriage would be preferred, on the short ground, that the qualification competent to such marriage must be confined to the territory by which such qualifications are allowed; and that, being contrary to the general principles of law affecting that contract, they could not be recognised in this country to affect the descent of land estate, where they were utterly unknown.

In like manner, in the present case, where it is attempted to limit the effects of marriage contracted in Scotland by the operation of a special enactment in England, and thereby to determine a question of status, on which the rights of succession to an heritable estate in Scotland must depend, it seems to be contrary to sound principle to admit the operation of such a provision, or to allow it to control the rights arising under a Scotch marriage, and to deprive the child of the late Mr. Ross of the power of succeeding to him as heir to that property, which, by the law of Scotland, he might be entitled to take up.

Thus, too, it is to the same purpose stated by Blackstone, that even if an incestuous marriage is formed, the issue of that marriage in England will enjoy all the rights of lawful children, if it has not

been challenged and avoided during the lives of both the parents. Now, put the case that a party having an estate in Scotland forms such a connexion, and, while domiciled in England, marries in Scotland, and dies in England leaving issue—the legitimacy of that issue could not be challenged, it would seem, in England. It will not, however, I presume, be contended, but that in this country, and in such a case, where an incestuous marriage is held to be void and null, their claims to the status and the rights of lawful children would be at once rejected.

In the preceding judgment, I wish to be understood as giving an opinion confined entirely to the present case, where the parents of the defender were natural born British subjects, capable of being equally affected by the peculiar institutions of Scotland, when living under them, as they would have been by the institutions of England when subjected to them. I have no occasion to consider what might be the case of foreigners not born within the allegiance of the Crown, and contracting a marriage while merely passing through the country, when, as in the case of two English citizens marrying in France, mentioned by Boullenois, 'y auroient été mariés sans s'y être fait naturaliser, parce qu'étant veritablement étrangers, et comme tels soumis aux loix d'Angleterre.'

Neither do I mean at all to question the soundness of the decisions in the cases of Sheddan and Strathmore, both of which, I have understood, every lawyer has held to have been rightly determined. But in both those cases the parties were subject to the qualifications and limitations of the law of England, and had contracted their marriages within the territory of England or America, (where the law of England prevailed,) by which the principle of legitimation per subsequens matrimonium is excluded.

In these cases, therefore, the status of all parties had been competently fixed within the particular territory in which their marriages were contracted, by a system of law omnipotent within its own boundaries. In particular, the status of the children, as filii aut filiæ nullius, had been finally and irreversibly established by the limitations of that system, and thereby all evidence had even been excluded of their filiation to their supposed parents. In those cases, therefore, there was no ground for holding that a new status should be conferred on the children. On the contrary, the grounds on which I have ventured, in this very difficult and important case, to deliver my judgment, necessarily lead to the conclusion that the children in both those cases could not be legitimated.

It perhaps may be proper also to mention that I can pay no regard to the report of the case of Birtwhistle, determined in the Courts of Law in England; because I am quite aware of my own incapacity, as acquainted with the law of Scotland, fully to comprehend the views and principles by which such questions may be

regulated in the Courts of Westminster Hall. I shall only observe, that in that case, as stated in the pleadings of the parties, no Scotch lawyer would have doubted for a moment that the child claiming as the heir would, in the Courts of this country, have been recognised as a legitimate son; and that I have understood the judgment proceeded, not upon any general principle applicable to the present case, but upon a technical view of a text in Coke, regarding the character of an heir according to the law of England; and that, had the matter in issue regarded personal estate, the decision would have been different. But, with great submission, the present question has nothing to do with the determination of the Courts of Law in England, except it be adduced as establishing, by way of precedent, a general principle; and if the case of Birtwhistle, as it appears to me, has determined any general principle at all, it establishes this, that in all such questions no regard is paid by the Courts in England to any other law than their own, which refuses to bend to the dictates of a foreign law, even when the question is one publici juris.

Upon the whole, I am humbly of opinion that the judgment of the Commissaries, finding that the defender is, in Scotland at least, entitled to the status and the rights of the legitimate son of the deceased Alexander Ross, ought to be confirmed by dismissing the advocation.

Lord Gillies.—It appears that the defender's father was a native of Scotland, and his mother a native of England; but these facts seem to me to be of no consequence, as I am humbly of opinion that the lex originis of the parents cannot influence the determination of the present question. I am likewise of opinion that the domicile of the parents at the time of the conception or birth of the child is of no consequence.

The fact of the defender having been born in England may be of more importance, and shall afterwards be spoken to.

On full consideration, it is also my opinion that it is of no consequence to ascertain whether, at the period of their marriage, the defender's parents were domiciled in Scotland. The domicile of intestate succession, to which I here allude, and to which counsel in their argument referred, depends not only on the act, but on the intention of the party. It is not enough that he be resident, but he must be resident animo remanendi in the country by whose laws his intestate succession is regulated. This often makes the question of domicile a difficult one; but the rule in itself appears to be just, and founded on sound principles. The general principle is, that succession should be regulated by the will and intention of the deceased; and, if he fails to express his will, the circumstance of his residing animo remanendi in a particular country raises a pre-

sumption that he wished or intended his succession to be regulated by the laws of that country. Thus, in every case, it is held that succession is regulated by the will (express or presumed) of the deceased. But the intention or will of the party, which is of paramount importance in a question of succession, is of no consequence at all in a question regarding the legitimacy of his children. This must depend on the fact of marriage, to which, no doubt, the consent of the parents is necessary. But, if that consent has been given, and a marriage has actually taken place, the legal effects of that marriage quoad the children cannot be influenced, or at all affected, by the will or intention of the parents. The principle, therefore, upon which the domicile of the party is held to be of so much consequence in a question of succession, has no operation in this case; and I humbly think that the judgment to be pronounced in it should not be influenced by the lex domicilii, any more than by the lex originis.

It appears to me that the merits of this case may be comprised in the two following questions:—

1. On the one hand, is a child born of unmarried parents in England absolutely incapable of legitimation? Is the quality of bastardy, so stamped upon it at its birth by the law of the country in which it was born, indelible?

Or, 2. On the other hand, can the legal effects of a marriage duly contracted in Scotland be affected and defeated in compliance with the laws of other countries in which the persons may have resided, or been domiciled, prior or subsequent to the marriage?

In considering these questions, it is not very easy to preserve a separation of the argument; and I shall not attempt to do so in the few observations now to be offered.

That an illegitimate child born in England is incapable of being legitimated in England by the common law of England, may be true; but that goes a very little way in the present question; nor does it by any means follow, from an admission that such is the law of England, that the same child may not be legitimated in another country by the marriage of its parents in Scotland, where legitimation per subsequens matrimonium is an acknowledged doctrine of the law.

The proposition which the pursuer maintains, and in my opinion must maintain, in order to prevail in this litigation, viz. that such character of bastardy is indelible, appears at first view rather a startling one—and this impression will not be removed or weakened by attending to the practical consequences to which it may lead. Two persons, natives of, and domiciled in Scotland, but occasionally visiting or residing in England, have a numerous offspring, suppose twelve children, born alternately in Scotland and England, six in each country. The parents finally enter into a marriage in Scotland; and, according to the pursuer's argument, the effect of this marriage is to

confer legitimacy on one half of the family only, while the other half remain bastards. A doctrine can hardly be right, or agreeable to sound principles, which leads to such consequences.

It is not denied that the legal effect of a marriage in Scotland is to legitimate all the children previously born of the parties who contract the marriage. As in the Roman law, so by the older writers on the law of Scotland, this doctrine is laid down without qualification, and as subject to no exception. It is true, I believe, that by the Canon law it was held that children born during the subsistence of a prior marriage of either of their parents could not be so legitimated. This exception seems reasonable, since otherwise the right of the children of the prior marriage might be defeated by the legitimation of the children, older by birth of the subsequent marriage. There is no decided case, however, by which such an exception is sanctioned, nor is it countenanced by our older writers. But Mr. Erskine says, 'The subsequent marriage, by which this sort of legi-'timation is effected, is, by a fiction of the law, considered to have 'been contracted when the child legitimated was begotten, and con-'sequently no children can be thus legitimated but those who are 'procreated of a mother whom the father, at the time of the procrea-'tion, might have lawfully married. If, therefore, either the father 'or the mother of the child were at that period married to another, 'such child is incapable of legitimation,' &c. A prior marriage, according to this authority, prevents the operation of the fiction, because it incapacitates the parties from marrying, and renders their marriage legally impossible at the period when, by the fiction, it is held to have taken place. But the parties are not incapacitated from marriage, nor is their marriage at the requisite period rendered impossible, by their residence and the birth of the child in England.

It will be observed that Mr. Erskine, in stating and approving of the exception which he mentions to the doctrine of legitimation per subsequens matrimonium, rests his opinion entirely on an inference arising from the legal fiction, that the marriage is held to have been contracted when the child was begotten; whereas I could rather wish that he had rested it on those solid grounds of justice which I have mentioned. Fictions of law seem to have been the inventions of an early and rude age. They were resorted to in those ages in order to accommodate new rules to preconceived notions of law, to reconcile an apparent or imaginary inconsistency betwixt new regulations introduced on views of equity and expediency, and the system of law as existing before their introduction.

In such cases, and assuredly as it appears to me in the present case, the legal fiction is not the foundation of the rule. The rule is founded on principles of justice or expediency; and the fiction is resorted to, merely to explain and reconcile it to the principles or notions of the lawyers of the time. It may therefore be doubted how far it is reasonable in every case to hold that the rule is to be con-

trolled or defeated in its operation by arguments derived, not from the principle on which it is founded, but from the legal fiction with which it was at its introduction unnecessarily encumbered;—I say unnecessarily, because in later times our laws have no reference to any such fictions. Thus by the act 1696 it is declared that certain deeds granted by a person within a period of sixty days prior to his bankruptcy shall be null. If this law had been one or two centuries older, we should probably have been told that there was a legal fiction by which the person was held to be bankrupt at the date of the deeds so granted by him; and then there might have been room to maintain that he was not in a situation in which he could have been made bankrupt at that period, and that therefore his deeds could not be set aside.

It is the rule of our law, founded on views—and I think they are not mistaken views—of expediency, that natural children shall be legitimated by the subsequent marriage of their parents. But this, appearing to be inconsistent with the previous general doctrine that children born in wedlock only are legitimate, some of our commentators resorted to a fiction to reconcile the inconsistency; and Mr. Erskine mentions this fiction as the ground of the exception which he points out. But the exception, if it be one, as I think it is, which the law would recognise, is an exception founded on manifest principles of justice—justice to the children who may be born of the prior marriage; and it therefore ought to be received, and would be received, independent altogether of the legal fiction, from which Mr. Erskine derives it. Availing himself of this, and looking at the legal fiction alone, the pursuer maintains that it is to have the effect of controlling the rule, and defeating its operation, in a case to which, but for the arguments derived from the legal fiction alone, the rule would certainly apply. A child born in Scotland of Scotch parents in 1815 will undoubtedly be legitimated by their subsequent marriage. But if the same parents happen, for an intermediate period, to reside and to be domiciled in England, and a child is there born to them in 1816, the child, according to the present argument, cannot be legitimated; because, by the law of England, there is no room for the fiction, that they were married when the child born in that country was procreated. Such, perhaps, are the consequences that may naturally be expected to follow from permitting the rules of law to be explained and controlled by arguments derived from fictions, resorted to when the rules were made, to accommodate them to the notions of law prevalent at the time, and to reconcile men more easily to their introduction.

It is said that the character of bastardy in England is indelible. But why is it indelible? Because legitimation per subsequens matrimonium has no place in the law of England; and because, such being the law of England, a subsequent marriage in Scotland cannot have the effect of legitimating a child born in England. Now, let the

process of reasoning by which this proposition is supported be attended to. It will then appear that the only ground for denying such effect to the subsequent marriage in Scotland is, that the law of this country is said to be founded, or to proceed on, a fiction which cannot operate extra territorium. Thus, in whatever way the pursuer may shape his argument, it is manifest that the whole of it is to be traced to the legal fiction. His reasoning consists, not in showing that our law in its principle does not apply to this case, but in endeavouring to show that its application to this case cannot easily be reconciled to a useless fiction, by which, for the reasons formerly mentioned, I humbly presume to doubt whether the law ought at all to be controlled.

But should those general considerations which I have taken the liberty of suggesting be entirely disregarded, a very important point remains for inquiry,—namely, whether Mr. Erskine, and the other writers whom he has followed, are right in stating that, by the law of Scotland, the doctrine of legitimation per subsequens matrimonium really proceeds on the fiction so often mentioned. Now in this I apprehend they are quite mistaken. The civil law forms, in truth, the law of Scotland upon this point. But in the civil law no mention is made of the fiction. This was only resorted to at a later period by the canonists, whose authority with us is of a secondary nature. This, then, is not the case of a fiction coeval with the rule of law, and on which the rule at its introduction was declared to rest. Here the law, as originally promulgated, stood on its own proper principles of justice and expediency; and the question is, Whether this law is to be controlled by a fiction not countenanced by the civil law in which the rule originated, and which is in truth our law, but introduced at a later period by the canonists?

It is worthy of remark, that the law of France, if I am rightly informed, has no reference to this fiction. But legitimation per subsequens matrimonium has place in the law of France, as well as in the law of Scotland. In both countries the doctrine is confessedly derived from the civil law; and when it appears that the civil law gives no countenance to this fiction, and that it is not received at all into the French law, it does seem unreasonable to maintain that it is to regulate or control the whole of our doctrine on the subject.

But admitting Mr. Erskine's doctrine, and the grounds on which he rests it, to be perfectly sound and unexceptionable, it must be carried a great deal further, and greatly extended indeed, before it can support the pursuer's plea. Mr. Erskine puts the case of a marriage subsisting at the time the child is procreated, which made it legally impossible for its parents then to marry, as forming an insurmountable bar to its legitimation by a subsequent marriage. Here there existed no such legal impossibility. It is said that the parents were resident and domiciled in England at the time of the defender's procreation. There was nothing, however, to prevent them from entering into a lawful marriage in England at that period.

It is an invariable maxim that no fiction shall extend to work an injury. But, on the other hand, it may be held as a general maxim, that a fiction shall be so far extended as to accomplish its object, and to work out the rule with a view to which it was adopted. From the marriage of the defender's parents in Scotland, there arises a legal fiction that they were married at the time the pursuer was procreated; and, agreeably to this fiction, it appears to me that their prior marriage must be feigned to have taken place in Scotland also. The fictitious marriage derives its origin from the actual marriage—the one is the creature of the other; and in whatever country the one took place, the scene of the other must be laid in the same country. The actual marriage was a Scottish marriage—the fiction is a Scottish fiction, necessarily consequent on the marriage; and it is therefore in Scotland that we must hold the fictitious marriage to have been celebrated. It is no doubt asserted, and truly asserted, that the defender's parents, in point of fact, were not in Scotland at that period. But contra fictionem juris non admittitur probatio. If it be a fiction of law that the parties were married in Scotland, it is of no more importance to prove that they were not in Scotland, than to prove that there was no actual marriage.

On the whole, to return to the questions formerly proposed, I state it as my opinion, in answer to the first, that the character of bastardy is not indelible; and in answer to the second, that the legal effects of a marriage contracted in Scotland cannot be affected or defeated in compliance with the laws of any foreign country in which the parties may have been, or continue to be domiciled. I proceed mainly on the principle that the lex loci contractûs must be the governing rule in this case.

Lord Balgray.—The case of Mr. Ross is of importance, and is attended with considerable difficulty. The facts are few, and are but little controverted by the parties.

Mr. Alexander Ross was a native Scotchman. By inheritance he was entitled to heritable property in Scotland; and by settlement he became proprietor of a large estate, upon which he had a residence. Occasionally he came to Scotland to visit his friends, and to exercise the rights of a Scotch landed proprietor. His more constant residence was in England, where he carried on to the day of his death a very extensive business.

In June 1815 Mr. Alexander Ross came to Scotland with the mother of the defender, evidently with the avowed purpose of celebrating a regular marriage with her, and of thereby legitimating the defender, born in 1811, according to the law of Scotland. A residence followed of some eight or ten weeks at Cromarty-house, the family mansion.

Mr. Alexander Ross having died in 1820, the question arose as to the legitimacy of the defender, and his right of succession to the estate of Cromarty.

Although the facts be not complicated or numerous, yet they do give rise to such views of law as to occasion considerable perplexity. The question is of that nature, that it is apprehended it cannot be solved, or justice done to the parties, by resorting to any one single principle. Several principles of law must, it is thought, be admitted in combination, as elements for the decision of the question.

1. This Court must be guided and directed by the laws and customs of Scotland, where they are acknowledged and admitted, however peculiar they may be. At a very early period, 'It was or-'dained that all and sundry the King's lieges of the realme, live and 'be governed under the King's lawes and statutes of the realme al-'lenarlie, and under na particular lawes, nor special privileges, nor 'be no lawes of other countries or realmes;' 1425, c. 48, and 1503, c. 79; Stair, b. i. tit. 1. § 16.

The comitas gentium does not authorize the adoption of any other law which is adverse to the usages or the common laws of the realm of Scotland.

2. The question here is in so far a pure question of status; but it has reference, and the claim can only be competent in respect of that reference, to a succession to a landed estate in Scotland; and of course the Court is bound to consider the question as in a competition of brieves, and to decide as a Scotch Jury, and to find and declare who is the lawful heir to the estate of Cromarty, according to the laws and usages of Scotland.

3. The rights and privileges which are the adjuncts of heritable property, depend upon the law of the country where it is situated. The peculiarity of constitution of each country mainly depends upon the mode of holding such property, and of its transmission either inter vivos, or by succession. Hertius de Collisione Legum, sectio 4. § 9. 'Quilibet advena in percipienda hæreditate, succedit non se-'cundum suæ personæ, sed secundum jura terræ Saxoniæ, etiam 'cujuscunque terræ sit, sive Bavariæ, Franciæ, vel Suevicæ nationis.'

4. Mr. Alexander Ross was a native-born Scotchman, and as such entitled to enjoy all the rights and privileges which the law of Scotland can bestow; and if any peculiarities regarding private rights do exist in that law favourable to Scotchmen, of such no Scotch Court of Justice can deprive him. That character and that right are perfectly indelible; and certain effects of that birthright, even in these times, must be acknowledged by every Scotch lawyer to exist, and did exist, at the hour of his death.

The legitimation per subsequens matrimonium is now part of the undoubted law of Scotland. It is a privilege granted by the laws, of which every Scotchman is entitled to avail himself. Had Mr. Ross remained in Scotland after his marriage, no doubt could possibly have been entertained about the matter. The pursuer could have pleaded in vain to a Scotch Court or Scotch Jury that the character of bastard stamped in England on the defender at his birth was indelible.

5. It has been said that the birth in England, when joined with the circumstance that the parents were then domiciled there, stamps an indelible character of bastardy, and which operates as a medium impedimentum, and prevents the legitimation per subsequens matrimonium.

But this is truly a begging of the question. The child is no doubt illegitimate at its birth in England, but so it would have been in Scotland also; and we only make the bastardy indelible by assuming, which is the matter in dispute, that it cannot afterwards be removed by the operation of the law of another country. If this is a just principle of law, then it will necessarily follow, that had Alexander Ross upon his marriage relinquished all connexion with England, settled in Scotland animo remanendi, and continued domiciled there to the day of his death, the child could not have been legitimated;—in short, that the domicile of the father does not regulate the status of his family generally, but only his domicile at the moment of birth. This does not appear to be sound law, and the case cannot be rested on such a footing.

6. It is always to be kept in view, that marriage by the law of Scotland is nothing but a civil and consensual contract; and consequently, in certain respects, it is open to those modifications which apply to other common consensual contracts. In Scotland, Scotch people living together as husband and wife will constitute a marriage; but the acting in this manner in another country where such is not the law, will be no evidence of that tacit consent inferring marriage; and in such a case, there could thereby be no legitimation per subsequens matrimonium.

7. The domicile of Mr. Alexander Ross was no doubt in England. More properly speaking, it was the domicile of his trade or business. From England being the place of domicile, it seems to be clear that his intestate moveable succession must be regulated by that law. His personal rights and moveables are supposed to be there all concentrated; and it is presumed that it was his intention to destine that species of property according to that law. All this is perfectly consonant to reason, and to the now established principles of law relative to moveable and personal property. But the whole of this totally fails in the case of heritage. Presumed intention no longer exists. The acquirer of heritable property must lay his account with subjecting it to the rules and regulations of the country where it lies; and the law of that country in that respect cannot alter with the varying residence of the owner.

Under obvious modifications, there appears to be no inconsistency in two or more domiciles, although it may be necessary to fix on one as deciding the moveable succession. There is no inconsistency in one class of heirs taking the moveable succession by one law, and another class taking the heritage by another law;—that is to say, it does not necessarily follow that the law of the domicile is to regulate the succession to heritage.

It has been argued that the opinion of Boullenois determines this matter against the defender, Vol. I. p. 62. It is conceived that this is rather an authority in the defender's favour. He states the case of English persons having a child in England born in concubinage, and coming to remain in France, and being there married; but he adds, 'sans s'y être fait naturaliser,' and of course that qualification makes part of the elements of his opinion; and all must agree with him that these persons were to be held as English people, and subject to their own laws. But it seems necessarily to follow, that if these persons had been naturalized in France, the legitimation would have followed.

Now it may be asked, was not Mr. Alexander Ross a Scotchman to every intent and purpose? Did he not come to Scotland for the avowed purpose of celebrating a regular marriage, and with the clear and evident intention of legitimating his son, the defender, and creating to himself a lawful heir, according to the laws and forms of his native country? He had no occasion to be naturalized, and the wife became participant of his rights.

8. In the last place, I humbly think that if the marriage was a lawful marriage, which no one can dispute, all the legal consequences must follow, and that in every other country. The contrary doctrine seems to be extremely anomalous.

Having due consideration to these principles of law, it would now be necessary and proper to show their application to the circumstances of the present case; but having had an opportunity of seeing the opinions of Lord Gillies, Lord Mackenzie, and Lord Medwyn, and concurring with what has been stated by their Lordships, I consider such a deduction to be unnecessary and superfluous.

Upon the whole, it appears to me that this case must be determined by taking into view various principles, and that the whole combined must be taken under consideration; and, by so doing, the necessary result appears to be, that the defender ought to be held by the law of Scotland as the lawful heir of the late Alexander Ross, and that the judgment of the honourable Commissaries is right.

Lord Eldin.—In the declarator of bastardy at the instance of Mrs. Rose, and Mr. Rose her husband, against George Saunders the bastard, a minor, and his curators, various proceedings have taken place.

Saunders was born in England on the 6th February 1811. His mother, Elizabeth Woodman, cohabited with Alexander Ross for some time. Ross was a Scotchman by birth, but he had left Scotland and lived in England for fifty years before his death, by which he lost his Scotch domicile.

In the month of June 1815, Alexander Ross, with Mrs. Woodman and young Saunders, left their place of residence in England, and

went to Scotland. It appears that their purpose was to celebrate a marriage in Scotland, and they expected to legitimate young Saunders as the son of Mrs. Woodman and Alexander Ross. The grounds for such a pretended legitimation were very slight. Saunders was a bastard by the law of England, which reached him both by his father and mother, and completed his bastardy on both sides of the house. It would be in vain to pretend that such a state of bastardy could be removed. Even supposing the parents could marry, and by that marriage legitimate the children afterwards born, no legitimation of the bastard already born could take place.

The Scotch marriage would have legitimated all the children afterwards born of that marriage; but it is another question, whether the marriage in Scotland was effectual to legitimate the bastard born in England four or five years before the marriage took place.

It does not appear that any thing has been attempted, by which a difficulty so manifest can be counteracted. The question is, whether a notorious bastard, settled and fixed in that state, without any remedy that can be suggested, is a person that can be legitimated and relieved from the stain of bastardy? There are, no doubt, cases in which legitimation per subsequens matrimonium is allowed, and the parties are relieved by the lenity of the law. But, on the other hand, the law is in many cases enforced with much rigour, and to the effect of fixing the bastardy upon the individual for his life, and without the least hope of remedy.

But further, it is necessary to attend to the situation of the parents. The mother was an Englishwoman and a stranger, and the man, woman, and child returned to England after the lapse of a few weeks. It is evident that they had obtained no link or hold of the country, and still less had they obtained a status authorizing them to use the privilege of their marriage one jot beyond the act of living together as man and wife from the time of their marriage, which left the bastardy untouched, and the blot of many years bastardy remained with them all. So far is this case from resembling other cases, in which a marriage, though it is celebrated at the distance of twenty years after the birth of a bastard, may yet be legitimated by the circumstances, which often occur to give such an advantage, although in many other cases no such benefit can be had.

It has been pretended that the marriage between Ross and Mrs. Woodman had the effect to put an end to all the difficulties arising from the circumstances of the case. But this is a very gross error. Ross and Mrs. Woodman made a marriage, and they obtained all the legal privileges which belonged to that marriage. But it is a great mistake to suppose that the parties gained any thing more by their marriage than the privilege of living as man and wife, dated from the period of the marriage, and without any retrospect to events which had previously happened. It would be in vain to say that George Saunders did not remain a bastard, subject to all the disabi-

lities which necessarily followed his bastardy. Alexander Ross pretended to be the father of the bastard; but who can say that Saunders was the legitimate son of Mr. Ross and Mrs. Woodman?

But this is not the worst that must follow the conduct of Alexander Ross and his wife. There are disabilities in law for such cases, to prevent the parties from forming other connexions.

No doubt it may happen that a long-continued bastardy in Scotland is removed by favourable circumstances. For example, if the parents have always been domiciled in Scotland, the children may be legitimated by a Scotch marriage. But the present is a different case. Saunders is exposed to numerous entanglements of the law of England, from which, to all appearance, there are no means to make him free. He is under the necessity of grappling with these difficulties; and if he cannot get rid of them, the law of Scotland will avail him nothing.

If it should be possible to get rid of these questions, there is another, which it is not so easy to encounter when it occurs. It has been laid down as law by two decisions of the House of Lords, that a man domiciled in England or in America, having an illegitimate child by an English or an American woman, does not, by marrying the woman, legitimate the child. What other hardships may attend his situation may be uncertain. The question is, whether Mr. Ross and Mrs. Woodman were in a capacity to celebrate a legitimacy of their son? It is not easy to say how all these difficulties can be avoided.

It might have been practicable to make a marriage for young Saunders when he came of age. But this is not the difficulty to be combated. It is easy to make a marriage between two persons, both of whom are at liberty to marry; but it is not so easy to unravel the conduct of Ross and Mrs. Woodman, sheltered in a long series of years by every contrivance that occurred to them.

It is evident that this is a case which depends entirely upon the law of England. Apparently the law of Scotland has no concern with it. Mrs. Woodman, with her son, and Ross, were all of them equally domiciled in England, and were subject to all the laws of that country. Under these circumstances, it is quite in vain to pretend that the parties, or any of them, had power to escape from the evident difficulties that surrounded them in their attempts to avoid the English law.

The Judges of the Second Division delivered their opinions as follows.

Lord Justice-Clerk.—It appears to me extremely important, in judging of this case, to observe how it has arisen. In the summons it is set forth that the pursuer was about to claim the estate of Cromarty, when she was opposed by a brieve of service obtained by the defender as lawful son of Alexander Ross, which she denies him to be. The course of procedure adopted by the Commissaries was

perfectly regular, and is sustained as far back as Balfour, who, at p. 239, observes :—' Gif ony persoun, as heir, claims ony heritage fra ' ane uther, and the defender alledgis that the pursuer is bastard and ' not gottin in lauchful marriage, this clame of heritage intented be- ' foir the temporal judge sall ceis and sleip untill the questioun of ' bastardie be decided befoir the spiritual judge, and quhill it be cer- ' tainlie knawin quidder the pursuvar is bastard or lauchfullie be- ' gottin; for it pertenis not to the temporal judge to decide in the ' action and cause of bastardie.' There is therefore no objection in point of form, and I am authorised to state, that a doubt expressed in Lord Craigie's opinion as to that has now been removed. The pursuer bottoms her right to insist in the action on her being heir of entail in the Cromarty estate; so that virtually what we have to decide, is a competition as to who is the heir of entail of Cromarty, a Scotch estate. The question, therefore, is to be decided according to the principles of the law of Scotland. It is now finally settled that the defender is the son of Alexander Ross; and as there is no evidence of any existing impediment to his marriage with Miss Woodman, (as by Miss Woodman being a married woman,) we must throw out of view the plea at one time set up, that the defender was not Alexander Ross's son. The other ground is, that the defender is not legitimated by the marriage of the parents. In judging of this, we are bound to take into view the whole facts of the case, and I hold them to be these :—Alexander Ross was born in Scotland—he inherited a paternal estate there. In 1786 he succeeded as substitute in the entail of the Cromarty estate, and became a freeholder in two counties. From that period he exercised the privileges of a freeholder—attended elections—managed his estate by a factor—and had all along a substantial hold of the estates till the day of his death. In 1777 he married, and had several daughters; and after the death of his wife he formed a connexion with Miss Woodman, by whom he had this son, whom we must hold as from the first acknowledged to be his son. Professedly for the purpose of availing himself of the privilege of the Scotch law, he came to Scotland in 1815 with Miss Woodman and his son, and in three weeks afterwards was publicly and regularly married by the minister of the parish. Shortly thereafter he went to Cromarty, where he introduced her as his wife, and the boy as his son, and then returned to London, where he resided till the day of his death, and where undoubtedly he was domiciled to the effect of the distribution of his moveable estate. Then, on these facts, can we listen to the objection made to the effect of this marriage? It is necessary to keep in view, that this was not the ordinary case of two persons living in England all their lives, and, having a distant prospect of succession to a Scotch estate, coming to Scotland for a day to legitimate their children; for we have here the father's constant and close connexion with Scotland; and I am

not moved by the cases put of parties coming to evade the law of England, as this was a fair bonâ fide proceeding according to the law of Scotland. The distinction is illustrated by the fact, that the widow is now in full possession of her legal rights, without dispute or challenge; so that, in regard to one important consequence, effect has not been denied to this marriage. It is impossible to think that this case is to be determined by inquiring into the origin of the principle of legitimation per subsequens matrimonium, or whether it arises from the adoption of the fiction, that a marriage took place before conception; but even if we adopt the fiction, where is the impossibility that the parents came down to Gretna Green? There is no impossibility in this; and I deny that the fiction cannot apply. Neither is it on the dicta of foreign jurists that we can decide this case. It was admitted at the Bar that they could not push the doctrine of indelibility of status so far as the jurists do, and that it must be received with innumerable qualifications. Take the case of slavery, or the very strong one of English marriages which may be dissolved in Scotland, if there is bona fides and no collusion, although by the English law they are indissoluble, except by an act of the Legislature. I cannot, therefore, go on the doctrine of indelibility; and the case is therefore brought to this, whether the connexion of the parents, and the birth of the child having taken place in England, are a bar to subsequent legitimation. I can see no authority for holding that the place of birth has any thing to do with legitimation. I cannot suppose that it has, otherwise our institutional writers would not have overlooked it if there was any such bar. On the contrary, Lord Bankton, at p. 121, lays down the rule generally without qualification, and without reference to the law of England, that marriage legitimates the previously born children of the parents. There are only two cases referred to—those of Sheddan and Strathmore. Now, in looking over the case of Sheddan, is it possible to say that it is a precedent for this? The marriage there was entirely in America. Sheddan was no doubt a Scotchman by birth, but he kept up no connexion with Scotland, and at that time had no property there. It was therefore entirely different from this case, although I entertain no doubt of the propriety of the judgment pronounced in it. In the same way in Strathmore, the father was born in England. He had Scotch estates no doubt, and was a Scotch Peer, and as such attended elections, &c.; but he did not come to Scotland—marry there—and take his wife to Glammis Castle. He married in England, and claimed a British Peerage; and although there had been no qualification by the learned persons who delivered their opinions in the House of Lords in that case, I could not hold it a precedent here; but the very learned person who then presided in that House used words expressly to exclude its being supposed that he decided such a case as the present. I am therefore of opinion that the bill of advocation must be refused.

Lord Glenlee.—As to the facts, the parties are in a great measure agreed. If the parties had never been out of Scotland, there could be no doubt but that the defender was legitimated. The pursuer, however, rests greatly on this, that foreign jurists lay down the law, that personal status, once imbibed, follows a man wherever he goes. I rather think that this is a mistaken view of their opinions; they only say, that if no actus legitimus intervenes to alter the status, it adheres to the person. It is no where said, that if a particular status is acquired, which the law of the country says is indelible, it cannot be altered by an act in a country where such status is not indelible. Even Boullenois' opinion in reference to the case assumed by him goes on the circumstance of the parties not being naturalized in France, so as to entitle them to the benefit of the French law; and it implies that, if they were naturalized, the consequences would follow. We know that all the subjects of the united kingdom are naturalized in every part of it, so that this defect cannot apply to the present case. But I think, at any rate, the foreign jurists go too far, as their opinions will not apply to our principle, that a slave cannot touch British ground; and the pursuer suffers by the maxim that statuta personalia do not follow, for she wishes to introduce a rule of English law not known in any other Christian or civilized state. In the case of Sheddan no act was done to alter the status; for we must give to marriage the effect of the law of the country where it takes place; and therefore in Sheddan's case it was impossible, even in accordance with the opinion of foreign jurists, that legitimation should take place, when that was not the effect of marriage in America. As to the fictitious cases put of English parties coming across the border to marry, with the view of legitimating their children, and immediately returning, I would reserve my opinion till they occur. If parties came here, having no estate, but only coming to get decree of legitimacy, to be effectual in England, I would dismiss the process, although I could not find that the defender was not legitimate. We have, however, nothing to do with that here. The only question is, whether the defender has been legitimated to the effect of succeeding to a Scotch estate? for the pursuer could bring no declarator of bastardy except to that effect; and I have no difficulty in concurring with your Lordship.

Lord Pitmilly.—I cannot bring my mind to detain the Court with delivering an opinion at length; for although in my notes I have followed a different arrangement, yet every thing which occurred to me has been stated in the printed opinions, or those now delivered; and I shall merely say, that I entirely concur with your Lordship and Lord Glenlee.

Lord Alloway.—I stand precisely in the same situation with Lord Pitmilly. I have prepared very full notes; but your Lordship has expressed so well my opinion, that I shall not repeat it.

Pursuer's Authorities.—Huberi Prælect. De Conflictu Legum, 2. 1. 3. § 3. 10. 12; Burgundius. de Statutis, p. 10. 18; Voet. de Stat. p. 187. 319; Hertius de Selectis, &c. 1. 4. 8; Hofacker, Prin. Jur. Civ. 1. p. 112-14; Merlin, Vol. X. § 7; Voorda, de Statutis, 3. 47. in Bib. Fac.; Pothier, Coutumes d'Orleans, 1. 1. l. 7; Cod. de Incolis, l. 27. D. ad Municipalem, § 1; Muller, Domicilium, § 17. 64. 76, Forum Contr. § 23; Boullenois, Traité de la Personalité, &c. Vol. 1. p. 62; Christophe, de Conti, June 21. 1668, (Grassiera, Journal des Audiences, No. 3. p. 283. inserted in the App. to Pursuer's Case); Bempde *v.* Johnstone, (3. Vesey jun. 198); Sommerville, (5. Vesey jun. 758); Pedie *v.* Grant, June 14. 1822, (ante, Vol. I. No. 544. reversed 1824); Morecombe *v.* M'Lellan, June 27. 1801, (F. C.); Sheddan *v.* Patrick, July 1. 1803, (F. C.); Strathmore Peerage, March 1821, in H. of L.

Defenders' Authorities.—Pothier, Vol. III. p. 320; Menochius, p. 662, No. 16; Schurff Cent. 2. 56. No. 4; Code Nep. Motifs, Vol. III. p. 15. 16. and 61; Perezius, p. 490, No. 26; Huber de Conflictu Legum, § 9. 12. 13. 15; Dictionnaire des Arrêts, Vol. I. p. 777, and Vol. II. p. 546; 2. Craig, 13. 16; 1. Ersk. 6. 52; 1. Bank. 5. 54; Hertius de Collisione Legum, § 4. 10. 16.

HORNE and ROSE, W. S.—PATERSON and LAW, W. S.—*Agents.*

No. 295.

J. NAPIER, Pursuer.—*Christison.*
J. THOMSON, Defender.—*Jameson—Monteith.*

May 16. 1827.
1st DIVISION. Admiralty. H.

THIS was a reduction of a decree of the Judge Admiral against Napier under special circumstances. The Court assoilzied from the reduction.

YOUNGS, AYTOUN, and RUTHERFORD, W. S.—J. PATERSON, W. S.—Agents.

No. 296.

A. STEWART, Suspender.—*Skene—Ivory.*
A. B. Charger.—*Brownlee.*

Attorney Licence—Stat. 25. Geo. III. c. 80.—Held that an unlicensed agent acting as agent in his own cause, and who has got decree for expenses, cannot recover more than his outlays.

May 16. 1827.
1st DIVISION. Lord Meadowbank. S.

THE charger, a writer in Edinburgh, as assignee of a bill of which Stewart was the drawer, having charged him for payment of the amount, Stewart brought a suspension, in which the Lord Ordinary found that the charger was an onerous bonâ fide holder, and that he was 'entitled to the whole expenses incurred by him.' Stewart presented a reclaiming note; but not having got it marked by a principal clerk, the charger objected that it was incompetent, and therefore that the interlocutor of the Lord Ordinary was final. The objection having been sustained, the case returned to the Lord Ordinary; and the charger's account of expenses having been remitted to the auditor, Stewart objected,

That as the charger had not taken out his attorney certificate during the currency of the account, he was disqualified from recovering any part of the expenses in terms of the statute 25th Geo. III. c. 80.

To this it was answered, That as he was acting as agent in his own cause, it was not necessary that he should have a certificate; and, at all events, that as he was claiming these expenses as a party, and not as an agent, and had been found entitled to them by a final interlocutor, the statute was inapplicable. On the other hand, Stewart maintained, that at least so far as regarded any profits or remuneration for trouble, the charger could claim them in no other character than as agent, and therefore, at the very utmost, he could only have right to his outlays.

The question having been brought before the Lord Ordinary, who reported it to the Court, their Lordships found that the charger was only entitled to decree for outlays.

Lord President.—I think the distinction is sound between the right of this party to profits and disbursements. He may be entitled to the latter, but the statute disqualifies him from recovering any profits as an agent.

Lord Balgray.—If we were to sanction any other rule, it would be attended with the most prejudicial consequences. Agents would just take indorsations to bills, or assignations to documents of debt, as in this case, and carry on actions in their own name, and so effectually evade the statute.

Lord Craigie concurred.

Suspender's Authority—Robertson, June 29. 1826, (ante, Vol. IV. No. 466); Stat. 25. Geo. III. c. 80.

J. Dickie, W. S.—G. Lang,—Agents.

Expenses.—In the case of Cotton *v.* Manuel, relative to an urban tenement, the defender having been found entitled to expenses, and the auditor having reserved the question whether he had right to the expense of a lithographic plan of the premises, which he had made without the order of Court, their Lordships found, that although it had been extremely useful, they could not lay the expense of it on the opposite party.

No. 297. D. JOHNSTON, Suspender.—*D. of F. Moncreiff—Pyper.*
J. DUNCAN, Charger.—*Jeffrey—Neaves.*

Lien—Freight—4. Geo. IV. c. 24.—Held,—1.—That a ship-owner, by a voluntary landing of goods, to be placed in a private bonded warehouse, under the Warehousing Acts, loses his lien for payment of freight;—and,—2.—That a delivery 'in docks,' in the meaning of the 4th Geo. IV. c. 24, § 83, which reserves the lien for freight, does not extend to docks of the description of those belonging to the Magistrates of Edinburgh at the port of Leith.

May 16. 1827.

2D DIVISION. Bill-Chamber. Admiralty. M'K.

UNDER the provisions of the Warehousing Acts, importers or consigners of all sorts of legal merchandise into such ports as should be licensed by warrant from the Treasury, are entitled to have such goods landed before payment of the King's duties, and deposited in bonded warehouses belonging to private persons, and licensed for this purpose, to be kept under the keys of the King's officers, and of the proprietors or occupiers of the warehouses, jointly. Goods so bonded are allowed to remain without payment of duties for three years; and it is provided that a sale by written contract by the importer shall be an effectual transfer without removal of the goods, although the warehouse in which they are deposited should belong to the importer himself. It is further provided by the statutes 12th Anne, c. 8, § 12, and 26th Geo. III. c. 40, § 14, (now superseded by the 6th Geo. IV. c. 107, § 16,) that every importer of goods shall land the same within 14 days of the arrival of the vessel; and that, in the event of failure, it shall be lawful for the officers of the Customs to convey such goods to the King's warehouse; and if the duties shall not be paid within three months after such 14 days shall have expired, the goods shall be sold, and the produce applied, first to the payment of freight and charges, and next of duties; the overplus, if any, to be paid to the proprietor of the goods. And by the 4th Geo. IV. c. 24, § 83, (which superseded the previous Warehousing Acts,) it is specially provided, 'That from and after 'the commencement of this act, all goods or merchandise which 'shall be landed in docks, and lodged in the custody of proprie- 'tors of the said docks, under the provisions of the said act,' (viz. the act 4th Geo. IV. c. 24. itself,) 'not being goods seized or 'forfeited to his Majesty, shall, when so landed, continue and be 'subject, or liable to such and the same claim for freight in fa- 'vour of the master or masters, and owner or owners of the re- 'spective ships and vessels, or of any other person or persons in- 'terested in the same, from out of which such goods or merchan- 'dise shall be so landed, as such goods, wares, or merchandise re- 'spectively were subject and liable to, while the same were on

'board such ships or vessels, and before the landing thereof; and 'the directors or proprietors of any such docks, at or in which 'any such goods or merchandise might be landed or lodged as 'aforesaid, or their servants or agents, or any of them, shall and 'may, and they are hereby authorized, empowered, and required, 'upon due notice in that behalf given to them by such master 'or masters, owner or owners, or other persons as aforesaid, to 'detain and keep such goods and merchandise, not being seized 'or forfeited to his Majesty, in the warehouses belonging to the 'said docks, as aforesaid, until the respective freights to which 'the same shall be subject and liable as aforesaid shall be duly 'paid and satisfied,' &c.

The port of Leith is licensed under the warehousing system, and there are extensive docks belonging to the Magistrates of Edinburgh, who are proprietors of the harbour, and who, by various acts of Parliament authorizing the building of these docks, have power to levy rates and make regulations for the shipping entering there. But it is not compulsory on any vessels coming to the port of Leith to enter the docks; nor are the vessels entering the docks in the possession and under the control of the Magistrates, as is the case in the various private docks in London, which are under a regular organized system of management by Boards of Directors, subject to the regulations of their respective acts of Parliament, and which vessels are compelled to enter, (according to the nature of their cargo,) and are placed in the complete custody of the proprietors, and obliged to land their cargo in their order, according to the directions of the proprietors, to be deposited in warehouses belonging to them.

Into this port George Gibson and Company imported a cargo of wood by a vessel freighted from the suspender Johnston by a contract of charter-party, whereby the freighters agreed to pay freight at a certain rate, 'one-half in cash, and the other 'half in good bills at four months date from delivery.'

The vessel entered Leith docks on the 26th of September 1825; and on the 5th of October the wood was landed and warehoused under bond, being deposited in a wood-yard situated in the docks belonging to the Magistrates of Edinburgh, and rented from them by Gibson and Company, the importers themselves, one key being kept by them, and the other by the King's officers.

On the same day on which the cargo was warehoused, one-half of the freight was paid to Johnston in cash; and for the other he accepted a promissory note by Gibson and Company at four months. This note (as to which it did not appear whether it

had been negotiated or not) was dishonoured when presented for payment on the 8th of February; and, on the 10th of March thereafter, Johnston gave intimation to the manager of the docks appointed by the Magistrates of Edinburgh,—to the King's officer, keeper of the key of the bonded yard, and to Gibson and Company as tenants of the yard, that the freight was still unpaid, and requiring them to detain the wood for payment thereof.

On the 4th of April Gibson and Company were sequestrated; and Duncan, the charger, having been appointed trustee, presented a summary application to the Judge Admiral, praying for warrant to sell the wood which was still lying in the bonded yard, and to have it found that no lien subsisted over the cargo for the freight, but that the proceeds should belong exclusively to him as trustee. In this application appearance was made for Johnston the owner of the vessel, who contended,

1. That the depositing of goods in a bonded warehouse was not such a delivery as, at common law, relieved them from the ship-owner's lien for freight; and,

2. That under the special clause in the 4th Geo. IV. c. 24, relative to delivery in docks, reserving the lien for freight, notwithstanding such delivery, his claim was still subsisting.

The Judge Admiral granted warrant of sale under reservation of this claim, which he appointed to be argued in Cases, and he thereafter found that 'the respondent Johnston has not either at 'common law, or under the authority of the Warehousing Acts, a 'lien over the cargo in question for payment of the one-half of 'the freight due to him.' The cause having been brought under review of this Court by bill of suspension on the part of Johnston, it was pleaded on his part,

1. That the warehousing of goods under the statutes was the act of the law; and as it could not be done on the application of the ship-owner, his landing them, and depositing them in a bonded yard, could not be considered as his voluntary act, and therefore that his lien was not thereby extinguished, agreeably to the judgment of the Court of King's Bench in the case of Wilson and Keymer; and further, that the warehousing of goods under bond was not a delivery, but that they remained in custody of the public officers for behoof of all parties having right therein, and consequently that, at common law, his lien subsisted equally as if he had retained the personal custody of them in his vessel, as was decided in the English case of Ward *v.* Felton.

2. That the clause of the 4th Geo. IV., reserving the right of lien over goods delivered in docks, was quite general in its terms, and could not on any sound principles of construction be

confined to any particular description of docks, but must apply to all docks embraced by the terms used in the act, which undoubtedly were sufficiently ample to include docks such as those at Leith; and,

3. That if there had been no such delivery as to occasion the loss of the lien, then the acceptance of the promissory note of Gibson and Company could not extinguish it, both because a 'good bill' was what the charter-party stipulated for, while the note given for the freight neither was a bill, (by which must be understood a bill with the security of a name in addition to the granter,) nor was it a good bill, seeing it had been dishonoured; and also because, if possession were to be considered as being still held of the goods by means of the keepers of the warehouse, the lien must necessarily subsist till the contract was fully implemented by actual payment of the freight.

To this it was answered,

1. That any delivery within 14 days after the arrival of the vessel was necessarily voluntary, there being no obligation on the shipmaster to part with the goods till the expiry of that period when they might be taken to the King's cellars, subject to the claim for freight; and as to the case of Wilson *v.* Keymer, that the delivery there had been a compulsory delivery under the London West India Dock Act; and that although goods bonded under the former warehousing system (during the existence of which the case of Ward *v.* Felton had been determined) might be considered as in publica custodia, and not delivered, yet that it was entirely different now, when they were allowed to be bonded in warehouses belonging to private individuals, in regard to which it was found in the case of Strachan, Jan. 21. 1817, (F. C.,) that the lodging of goods in them constituted an actual delivery, so as to divest the seller of his right of stoppage in transitu; and that this distinction was the more clear in the present case, where the yard in which the goods were bonded was in the occupation of the importers themselves.

2. That it was clear from the tenor of the clause in the 4th Geo. IV. that it had reference only to those docks belonging to private companies, and under the management of a Board of Directors, the vessels in which, with their cargoes, were actually in the custody of the company, and was intended merely as declaratory of what had been held to be the case at common law, or was provided for by their respective local statutes in regard to such docks; and,

3. That the lien could only subsist till the contract of affreightment was implemented; but that that had truly been done on the

day when the goods were delivered, by payment of one-half of the freight in cash, and the other in a bill accepted as a 'good 'bill,' and at all events that, after possession was parted with, the lien could not revive by the bill being dishonoured.

The Court unanimously refused the bill.

LORD JUSTICE-CLERK.—I am clearly of opinion that the Judge Admiral's interlocutor is right. As to the plea on common law, there is a fundamental error in the suspender's argument, in confounding the provisions of the Warehousing Acts with those relative to docks; and it is clear that the docks of Leith stand on a system totally different from the several London docks into which vessels are compelled to enter, according to the nature of their cargo, and are under the special care and charge of a company of proprietors. Vessels there are also compelled to land their cargo, and it was therefore correctly ruled by Lord Ellenborough in the case of Wilson *v.* Keymer, that as the delivery was compulsory, the lien still subsisted. The Leith docks, however, are in a totally different situation, and I conceive that the clause in the 4th Geo. IV. relates only to those docks put under a system of regulations which does not exist at Leith. It is therefore clear that no case can be maintained against the judgment. Then there is also the circumstance of the bill having been accepted; and as I hold the delivery to have been voluntary, the lien has been extinguished. If the ship-owner had retained the goods till he was compelled to land them at the expiry of the 14 days, the case would have been very different. As it is, we must adhere to the interlocutor.

LORD PITMILLY.—I am entirely of the same opinion. There is one fact not cleared up, which, if the decision in the case of Hornecastle be right, would of itself have been sufficient, viz. whether the bill was negotiated; but there is enough without it. There is a great distinction between this and the case of Wilson and Keymer, where the delivery was compulsory. Here it was voluntary, and the freight was at the same time settled by bill; and as to the notice to the manager of the docks, it was not given till the 10th of March, and the goods were warehoused on the 5th of October; so that it is quite extravagant to suppose that the lien was still preserved.

LORDS GLENLEE and ALLOWAY concurred.

Suspender's Authorities.—(1.)—Wilson, &c. *v.* Keymer, &c. (1. Ma. and Sel. 157); Ward *v.* Felton, (1. East, 512); Whitaker's Law of Lien, 72; Brown on Sale, 457.—(3.)—Holt, 176; Stevenson *v.* Blacklock, (Ma. and Sel. 535.)

Charger's Authorities.—(1.)—Sweet *v.* Pym, (1. East, 4); Strachan, Jan. 21. 1817. (F. C.)—(3.)—Hornecastle *v.* Farren, (2. Bell, 102); Cowe *v.* Simpson, (16. Vesey, 275.)

J. G. BARR, S. S. C.—J. MURDOCH, S. S. C.—Agents.

A. M'FARLANE and Others, Pursuers.—*D. of F. Moncreiff—More.*
MAGISTRATES of EDINBURGH, Defenders.—*Sol.-Gen. Hope—L'Amy.*

No. 298.

Harbour Dues—Stat. 28. *Geo. III. c.* 58.—Held,—1.—That steam-boats carrying passengers merely with their luggage fall within the description of 'passage-boats,' and are liable to pay rate only as such.—2.—That they are liable in payment of rates, in consequence of landing their passengers by means of a boat, or at a pier erected by the owners within the limits of the port, although not having the benefit of the artificial piers belonging thereto.

May 16. 1827.

2D DIVISION.
Ld. Mackenzie.
M'K.

BY various royal charters, and particularly the Golden charter of King James VI. in favour of the City of Edinburgh, there had been granted to the Magistrates the port and road of Leith, and likewise the port and road of Newhaven, 'from St. Nicholas 'chapel on the northern side of the town of North Leith, to the 'land denominated Windybrae,' together with 'the privileges, 'port-money, anchorage, &c. duties, &c. annexed to the said port.'

A table of the dues exigible by the Magistrates from all vessels coming into the harbours of Leith and Newhaven was drawn up in 1775, which table contained, inter alia, the following charge:—'All passage-boats, ferry-boats, and pinnaces shall pay of beacon-'age and anchorage, each time they come into the harbour, two 'shillings Scots; but if they bring goods, &c. they shall pay as 'other vessels, according to the tonnage.'

The right to levy certain of the rates contained in this table, at the amount charged, having been questioned, an act of Parliament (28th Geo. III. c. 58) was obtained, which set forth 'that it would 'be of great public utility to ascertain the fees and other dues now 'payable, and hereafter to be paid, by the owners of ships and 'vessels resorting to the said harbour, basin, quays, piers, and 'docks;' and therefore enacted that the Magistrates shall be entitled to levy, inter alia, in name of beaconage and anchorage, for each time they come in, 'for every passage-boat, ferry-boat, or 'pinnace, twopence sterling; and for all vessels, whether ships, 'barks, or boats, (other than drag-boats, fish-boats, yawls, ferry-'boats, and pinnaces before specified,) one penny halfpenny for 'each ton of their burden.'

At this period the passage-boats consisted entirely of boats plying with passengers across the Frith; but, after the invention of steam-boats, several vessels of that description began to ply, for the convenience of passengers merely, between Newhaven and Stirling and Alloa, and the other ports in the upper part of the river Forth. These boats having been prevented by

the Ferry trustees, with the acquiescence of the Magistrates of Edinburgh, from landing their passengers at the pier of Newhaven, the owners, at their own expense, with the permission of the Magistrates, but under a reservation of all their rights, erected a chain pier at Trinity near Newhaven, and within the limits of the port as described in the royal charter. At this pier the steam-boats landed and received their passengers with their luggage, which constituted their only cargo, without any demand being made for port-dues for some years. But, in 1824, the collector having demanded payment of arrears of dues at the rate of a penny halfpenny per ton, as being vessels 'other than yawls, 'ferry-boats, and pinnaces,' M'Farlane and others, owners of the steam-boat Morning Star of Alloa, raised an action of declarator to have it found that their vessel, not making use of the Newhaven pier or harbour, but of a pier erected at their own expense, was not liable at all in dues, which were by the act of Parliament declared exigible only from vessels coming into the harbour; or, at all events, that as she was employed in the conveyance of passengers and their luggage merely, she could only be subjected in the payment of twopence per trip as a passage-boat within the meaning of the 28th Geo. III., and not in three halfpence on each ton as a vessel of burden; and they contended, that as the imposition of dues must be interpreted favourably for the public, the term 'passage-boats' in the act of Parliament must be construed to mean boats carrying passengers merely, to whatever place, (there being no restriction in the act in regard to that,) as contradistinguished from vessels carrying goods which were properly charged by the ton, and which, from entering at the Custom-house, afforded a means of ascertaining the tonnage not possessed in regard to vessels carrying passengers merely.

To this it was pleaded in defence for the Magistrates,

1. That they were entitled to levy dues from all vessels landing their passengers or cargo within the bounds of the port, whether these vessels had the benefit of the existing artificial harbours, or not; and,

2. That as, at the date of the table of 1775, and subsequent act of Parliament, the regular ferry-boats, subject to all the strict regulations regarding ferries, and now under the management of Parliamentary trustees, were in truth the only passage-boats then existing, the term 'passage-boat' must be construed to have had reference to these merely, and not to a new class of vessels plying in a character then unknown, and between places to which there were at that time no passage-boats; and it was offered to be proved that in practice even the regular ferry-boats were always charged

with the duty per ton when they went to a port which was not within the ferry, even although they had merely passengers on board.

The Lord Ordinary pronounced this interlocutor:—'Finds 'that vessels ordinarily employed in moving, whether by steam 'or otherwise, between any port or ports in the frith of Forth 'and the ports of Leith and Newhaven, solely for the conveyance 'of passengers and their luggage, and not for the conveyance of 'goods, may more reasonably be considered, in reference to har- 'bour dues, as passage-boats liable to pay a certain sum for each 'trip, than as other vessels liable to pay dues in proportion to 'tonnage: But finds, on the other hand, that such vessels must 'pay dues as passage-boats, whether they enter the said harbour 'of Leith or Newhaven, or land the passengers within the limits 'of the harbours by means of small boats; and finds that the 'chain pier at Trinity is within the limits of the port of New- 'haven, and that the act of Council giving permission to erect 'that pier is so qualified, that it cannot be held to imply a dere- 'liction of the harbour dues to which the Magistrates of Edin- 'burgh had right from steam-boats landing passengers within 'the limits of that port; and therefore finds that the pursuers, as 'owners of the Morning Star steam-boat, are liable for harbour 'dues as for a passage-boat entering the harbour of Newhaven, 'but no otherwise, for each time that the passengers by the 'Morning Star have been landed at the Trinity pier in time past, 'and must be so liable in future: Finds no further judgment ne- 'cessary in this case, and decerns and declares accordingly: Finds 'no expenses due to either party.'

Against this interlocutor both parties reclaimed;—the proprietors of the steam-boat, in so far as they were found liable in dues, although the vessel did not enter the harbour,—and the Magistrates, in so far as the steam-boats were held to belong to the class of passage-boats; but the Court adhered.

LORD JUSTICE-CLERK.—I have a little hesitation as to the correctness of the interlocutor. I do not dispute the propriety of levying dues on vessels at this place. The landing passengers is enough to subject them, whether they come to the pier or not. But my doubt is in regard to whether they are only to pay duty as passage-boats. In the clause of the act of Parliament, where two different kinds of boats are mentioned, 'passage-boats' are omitted in the parenthesis, ('other than drag-boats,' &c.) which is a strong indication that the clause meant to refer strictly to ferry-boats. In common parlance, too, 'passage-boats' is used synonymously with 'ferry-boats.' The circumstance of steam being the medium of

movement in these boats can make no difference; but still it is a new trade sprung up, not of conveying persons merely across the Frith, but to all the districts accessible by water; and I can scarcely consider the vessels employed in such trade as falling within the meaning of 'passage-boats' used in the act.

Lord Glenlee.—The proper meaning of 'passage-boat, is a boat whose cargo consists of passengers; and as it is used in the act in addition to 'ferry-boats,' I think other classes of passage-boats besides those employed on the ferry must have been understood.

Lord Pitmilly.—I think the interlocutor right on the grounds stated in it. The question must be regulated entirely by the act of Parliament, which divides all vessels into two classes—those of burden which pay per ton, and those for conveyance of passengers which pay by the trip; and even ferry-boats pay by the tonnage when employed to carry goods. The steam-boats, however, when they merely carry passengers and their luggage, I conceive to fall within the first class, and to be liable only for the rate per trip.

Lord Alloway.—I entirely concur. The act of Parliament is the rule, and I cannot put any other construction on it than that given to it by the interlocutor.

J. Forman, W. S.—MacRitchie, Bayley, and Henderson, W. S.—Agents.

No. 299. W. Bruce and Others, Suspenders and Pursuers.—*D. of F. Moncreiff—Boswell.*

P. Sandeman, Charger and Defender.—*Sol.-Gen. Hope—L'Amy.*

May 16. 1827.

2d Division. Ld. Mackenzie. M'K.

Harbour Dues—Stat. 28. *Geo. III. c.* 58.—This was an action similar to the preceding one. Sandeman, collector of the harbour and shore dues of the city of Edinburgh, brought an action before the Court of Admiralty against Bruce &c., owners of the Tug steam-boat, for payment of arrears of dues, according to the rate per ton leviable from vessels other than passage-boats, &c., during a period prior to the erection of the chain pier, but when the steam-vessels were not allowed to use the regular stone pier, and were obliged to land their passengers in small boats at a temporary erection of planks put up by the owners. The Judge Admiral decerned for payment of the arrears at the rate per ton; but in a conjoined process of suspension and reduction brought by the owners, the Lord Ordinary pronounced an interlocutor exactly similar to that in the preceding case, and the Court in like manner adhered.

J. Forman, W. S.—MacRitchie, Bayley, and Henderson, W. S.—Agents.

P. Scott, Suspender.—*Cuninghame.* No. 300.
T. Gillespie, Charger.—*Baird.*

Nauta Caupones Stabularii—Oath in Litem.—The mate of a ship belonging to the Clyde having given up his situation at London, after the vessel's arrival there from her foreign port, leaving his chest in the vessel to be conveyed round to the Clyde with the vessel; and the master having thereafter sent the chest on shore, in consequence, as he alleged, of some smuggled goods having been found in it, and having given it in charge to a tavern-keeper there without notice to the owner—Held,—1.—That he was responsible for it to the owner, who was not obliged to accept an order on the person with whom it was deposited;—and,—2.—That the owner's oath in litem as to the value was to be taken in preference to the opinion of other individuals who had seen the contents after the master had sent the chest on shore.

May 16. 1827.

2d Division.
Ld. Mackenzie.
B.

This was an action raised before the Sheriff of Renfrewshire by Gillespie, who had been mate of a merchant vessel commanded by Scott, concluding to have the latter found liable in the value of a chest left in his vessel in the port of London, and which, it was averred, he had engaged to carry round to Greenock, the place of Gillespie's residence, and the ultimate destination of the vessel.

The Sheriff having, after certain procedure, allowed Gillespie to give his oath in supplement as to the facts, and in litem as to the value, and having decerned for the sum of £29 : 19 : 4 as the value of the chest deponed to in his oath, Scott brought the case before this Court by suspension.

From the proof taken in the Inferior Court, and afterwards in this Court, it appeared that the vessel commanded by Scott had sailed from Greenock for the West Indies,—that Gillespie had been appointed chief mate by recommendation of the owners, and that, on her return in March 1818, she had put into the port of London:—that while there, some smuggled sugar had been discovered on board, on account of which Gillespie as mate, and a son of Scott's, were fined by the Water Judge of Police:—that some days subsequent to this, the cargo having been completely delivered, Gillespie gave up his situation, and set off for Greenock, leaving his chest in the vessel, which was to sail for Greenock in about a week, having given the key to one Ross, who succeeded him as mate; and it was deponed to by one witness that he had heard Scott promise to Gillespie to take his chest to Greenock, without making any charge for doing so. It further appeared that, a day or two afterwards, the Custom-house officers had again searched the ship, and had found in Gillespie's chest, which they caused Ross to open, three stockings half full of coffee and a bottle of castor oil, which they seized. Immediately after this, and, as he alleged, in consequence of it, Scott ordered Gillespie's chest to be taken on shore, and deposited with one Forster, the keeper of a

tavern at Blackwall, of whom it turned out, contrary to Scott's original averment, that Gillespie knew nothing, and on this occasion he made the chest be opened, and had an inventory taken of the articles it contained. He then sailed with his vessel for Greenock, where Gillespie had previously arrived; and the latter, not receiving the chest, immediately raised this action before the Sheriff. There was no evidence that Scott had intimated his having deposited the chest with Forster before the action was raised; but, in his defences, while he denied having agreed to take charge of the chest, and contended that he was not responsible for it, he offered to Gillespie an order on Forster for delivery of the chest. Gillespie refused to accept this order, and it afterwards appeared that the chest had remained with Forster for about a year, and was then taken from him by one Jewell, with whom Scott and Gillespie had both lodged when in London, and who deponed that he had taken away the chest in consequence of a message delivered to him by a person who had received a letter from Scott, desiring it to be sent down to Scotland; but he further deponed that he had declined to be at the expense of sending it down, and that he had, two or three years afterwards, told Gillespie that he had the chest, but that Gillespie said he would have nothing to do with it. Jewell also deponed, that when he saw the chest opened at Forster's, the clothes were mouldy and damp, and that, including a quadrant, the whole contents of the chest were not, in his opinion, worth more than £4; and Forster in like manner deponed that he did not consider them worth more than £6.

On considering this proof, the Lord Ordinary remitted simpliciter, and the Court unanimously adhered.

Lord Glenlee.—I see no reason for altering. It was, no doubt, wrong in the Sheriff to allow Gillespie's oath in supplement to support the testimony of the single witness as to the express undertaking to convey the chest, of which there is certainly no sufficient evidence; but, independently of this, it is clear that Scott allowed the chest to remain in his ship, and it must have been understood that he was to carry it, although there is no evidence sufficient to show that he agreed to do so without freight. But there is here no question as to freight; and Scott's allowing the chest to remain in his vessel, eo ipso created an obligation to account for it under the edict. Nor did the seizure of the trifling articles in the chest afford any ground whatever for not fulfilling the obligation, or any excuse for sending it on shore to a man of whom Gillespie knew nothing, and opening the chest, and rummaging the contents, particularly without giving Gillespie notice of his having deposited it with Forster. If he had been alarmed at the seizure, he should have put the chest some

way or other in publica custodia; but he was just as well entitled to throw it overboard, as, of his own authority, to deliver it to Forster. Then, as to the offer of an order on Forster after the action was raised, Gillespie was not bound to accept of it; it was Scott's business to have the chest delivered in Greenock to Gillespie; and, on the whole, I am satisfied that responsibility was once attached to Scott, and that he never fairly discharged it. As to the amount of value awarded, the question has not been agitated, but the oath in litem is the regular and proper evidence of value in such cases; and £29 is not at all an extravagant estimate of the contents of a chief mate's chest, while the contents may have been deteriorated, or even part of them taken out, for aught that appears, before they were seen by the witnesses who depone to the value.

The other Judges concurred.

J. KENNEDY, W. S.—J. SINGER, W. S.—Agents.

M. MILLER and W. CARRICK, Petitioners.—*Rutherfurd—Shaw.*
J. MORRISON and SPOUSE, Respondents.—*D. of F. Moncreiff—Cuninghame.* No. 301.

Appeal.—Circumstances in which leave to appeal was refused.

THE Court refused leave to appeal in the case noticed ante, Vol. V. No. 192, in respect that there were subsequent proceedings which might possibly give rise to other appeals, and therefore that it was expedient to delay till the cause was exhausted.

May 17. 1827.
1ST DIVISION.
D.

A. P. HENDERSON,—TOD and WRIGHT, W. S.—Agents.

W. CUNNINGHAM and Others, Suspenders.—*A. M'Neill.*
J. BOYD and COMPANY, Chargers.—*J. W. Dickson.* No. 302.

LORD ORDINARY refused a bill of suspension, in respect of an oath, but found no expenses due. The Court adhered on the merits, but altered as to expenses.

May 17. 1827.
1ST DIVISION.
Bill-Chamber.
Lord Newton.
D.

A. NAIRNE,—STEWART and SPROTT, W. S.—Agents.

No. 303. OFFICERS of STATE, Pursuers.—*Sol.-Gen. Hope—Tait.*
MAGISTRATES of BRECHIN, Defenders.—*D. of F. Moncreiff—Ivory.*

Process—Reduction—Title to Pursue.—Held, where the merits in a reduction are greatly mixed up with the question of title,—1.—That it is competent to compel the defender to satisfy the production, reserving his objections to the title;—and,—2.—That the same course may be adopted in regard to an objection that *all* the proper parties have not been called, those who have been called being proper parties.

May 17. 1827.
2D DIVISION.
Ld. Mackenzie.
M'K.

AN alteration of the set of the Royal Burgh of Brechin having been made in 1820, by authority of the Convention of Royal Burghs, and the Magistrates having been elected in the years 1820, 1821, 1822, and 1823, according to the terms of the set thus altered, the Officers of State, in 1824, raised an action of declarator and reduction, to which they called as defenders the Magistrates and Councillors in office at the time, and which concluded for reduction of the new set as ultra vires of the Convention, and of the elections of Magistrates following thereupon in 1820, 1821, 1822, and 1823, and also to have it declared that the Convention of Royal Burghs had no power to vary, alter, or modify the sets of the Royal Burghs of Scotland, or any of them—that all warrants, &c. granted by the various Magistrates elected under the new set were illegal and ineffectual, and that the burgh was without a legal Magistracy. To this action dilatory defences were given in by the existing Magistrates and Councillors in their character as such, pleading that the Officers of State had no title to pursue, and that the proper parties were not in the field, in so far as the pursuers had not called the Convention of Royal Burghs, who were interested to support their powers challenged in this action—the persons who had been in the Magistracy in the years 1820, 1821, and 1822, whose actings as Magistrates it was concluded to have declared illegal—and the Trades and Guildry, who enjoyed greater privileges under the new than under the old set; and further, it was objected, after the action had gone on for two years, that the Magistrates of the succeeding years had not been made parties.

The Lord Ordinary having pronounced an interlocutor finding that 'the defenders ought to take, and should be allowed to 'take, a day to satisfy the production, reserving all objections to 'the title of the pursuers, or to the sufficiency as such of the par-'ties now called as defenders to this action,' and appointing the cause to be enrolled for this purpose, the defenders reclaimed, and contended that they were entitled to have a decision upon

these dilatory defences before they could be compelled to satisfy the production; but the Court adhered.*

The LORD ORDINARY observed in a note:—

The case of Sir William Forbes seems to afford sufficient authority for this interlocutor, against which the Lord Ordinary sees no valid argument. It might be dangerous to have an inflexible general rule, that a defender must satisfy the production, reserving objections; but there seems no danger in allowing this only in cases where it appears proper and safe to the Judge after discussion. The Lord Ordinary's reason for the order he has made in this case is, besides what is contained in his former note, the great extent of the libel, and the vast variety of different things it is calculated to effect. It is not only an action for declaring null the alteration of the set given by the Convention to the burgh of Brechin, (declaring also generally the want of power in the Convention to alter, vary, or modify the sets or constitutions of the Royal Burghs, or any of them, or to regulate the mode of electing any of the office-bearers, Magistrates, or Council of the said burghs, or any of them,) but also for annulling all the elections that have taken place annually since that alteration, and all the acts of the Magistrates elected at these elections, writs, and criminal warrants, and acts of intromission, being particularly named. In this way, all the judgments pronounced by the Magistrates in civil cases between party and party may be voided, though none of these parties are here; and in criminal cases all the sentences must be void. So in police, all the acts done by the Magistrates may equally be voided as lawless. The acts particularly of the Dean of Guild may lose authority, on which acts houses may have been built, &c. Now it seems to the Lord Ordinary that the Officers of State, in this suit between them and the Magistrates under the new set for one year, without the presence of any other party either as pursuer or defender, may very well have proper defenders, and a sufficient title to pursue in respect to some part of this, and yet not for all; and that it is not possible for the Lord Ordinary to define, beforehand, how much may be questioned here, or may not. This difficulty applies even to the title of the pursuers. But further, the Lord Ordinary cannot help having great doubts whether the objections to the sufficiency of the defenders are not in pari casu, and must either be decided or reserved along with those to the title of the pursuers. He is not able to think that any person called as defender may be compelled to satisfy the production in *any reduction*, or suffer decree of certification, which seems the consequences of the view that such objections are to be held objections on the merits. In this view, it is obvious how exceedingly inconvenient it must be to attempt to

* The Court decided in the same way a similar case with the Magistrates of Dundee.

define à priori all that may or may not be questioned in this process before satisfying the production. The Lord Ordinary cannot therefore yield his opinion as to the course of proceeding, but has pronounced such an interlocutor as will enable the parties immediately to obtain the opinion of the Inner-House.

LORD PITMILLY.—The only question before us is in regard to the course of procedure, as to which there is no argument in the papers. The *expediency* of the course adopted by the Lord Ordinary is plain and obvious. It is undoubtedly a *competent* procedure, and where the party consents there can be no difficulty. The only difficulty arises from the party not consenting, and the question is, whether that which is not in itself incompetent can be done where the party does not consent? In Sir William Forbes's case I was against the decision, and thought that we could not force a party to satisfy the production until the objections to the title were decided.* But as that case is now a precedent, and as I can have *no doubt* of the expediency here, and the title being so completely mixed up with the merits, I incline to adhere to the interlocutor. As to the objection regarding all the proper parties not being called, if it was that there were no proper parties, it would necessarily take the lead of every other question. It is, however, admitted here that there are proper parties called; but the objection is, that there are other parties who ought to have been called, and are not called. Now, it appears to me that if there are certain proper parties called, so as to make a proper cause depending, then the question if *all* the parties are called is one on the merits, and this was decided in the case of Mill *v.* Magistrates of Montrose, where on this point I agreed with the majority.

LORD ALLOWAY.—I entertain very great doubts on this question. The most important consideration in every case is to see if all those parties are called who have the interest to try the question. But here I doubt whether the only parties called in this case have any interest. They are persons who are now withdrawn from office, and yet they are the only persons called, although the conclusions affect all the prior and subsequent Magistrates, and likewise the Convention of Royal Burghs, who have the most important interest of all to try this great constitutional question regarding their powers. The objection is one of no process. It is said if *any* proper parties are called the cause may go on. I cannot agree to this. I think it is a question in limine, and that we must determine whether there be a process, which I do not think there is till all the proper parties are called. Then as to the objection of no title—suppose a title to exclude were produced in a reduction, can a party be obliged to open

* In that case, (Forbes *v.* Gibson-Craig, ante, Vol. III. No. 120,) 'Lord Pitmilly' is by mistake inserted instead of 'Lord Robertson,' as one of the Judges who voted against the interlocutor.

his charter-chest when he produces a title to exclude? There may be a class of cases where the question of the merits and the title are so entirely the same, that the parties have no interest to create a double discussion; but that is not the case here. In Sir William Forbes's case the words of the remit of the House of Lords required the production to be satisfied, and the majority of the Court proceeded on their understanding of the meaning of the remit; but as there is no such reason here for deviating from the uniform practice, I think the preliminary objections should be first decided.

Lord Glenlee.—When the objection to the title is, that the conclusions are of such a nature that the pursuer cannot insist in them, I do not see how it can be tried till the production is satisfied, at least without assuming that it is satisfied. When the objection is limited so as to be unconnected with the merits, it may properly be decided before production, as if it was in the present case that the Crown had no title to bring an action about Royal Burghs at all. In such a case, the defender might be entitled to insist on a decision on the question of the title, as being an action as to a matter with which the Crown had nothing to do. But as the objection to the title here has reference to the nature of the conclusions, the Lord Ordinary might properly have repelled it in so far as regarded the title to call for the production, reserving all objections to the title in respect of the conclusions; and what his Lordship has actually done is more favourable for the defenders than this would have been. As to the other objection of the proper parties not being called, I agree with Lord Pitmilly. We cannot know whether the other parties have such a necessary interest as to require that they should be called till the process proceeds a little, and till we see more of the nature of the action than we can do before the production is satisfied. On the whole, I am inclined to adhere.

Lord Justice-Clerk.—It does not appear to me that any thing is done by the interlocutor prejudicial to either party. It is still competent for the defenders, after the production is satisfied, to show that the pursuers have no title, and that the proper parties are not before the Court. This is not at all the case of a title to exclude, and it is not insisted that the Crown has fundamentally no title in such matters as this action regards; for if so, I would agree with Lord Glenlee that the objection would be preliminary. But considering the nature of the action, and how the title and merits are mixed together, and having the cases of Sir William Forbes *v.* Gibson-Craig as to the objection to the title, and of Mill as to the objection of the proper parties not being called, as precedents, I do not think that we ought to interfere with the course of procedure adopted by the Lord Ordinary.

Pursuers' Authorities.—Gibson-Craig *v.* Sir William Forbes, June 24. 1824, (ante, Vol. III. No. 120); Mill, Jan. 28. 1824, (ante, Vol. II. No. 618.)

F. Wilson, W. S.—J. Irving, W. S.—Agents.

No. 304. DUKE of BUCCLEUCH and QUEENSBERRY, Pursuer.—*Jeffrey—Dundas.*

A. GRIERSON and Others, Defenders.—*D. of F. Moncreiff—Henderson.*

DUKE of QUEENSBERRY'S EXECUTORS, Defenders.—*Murray—Cockburn—Cay.*

Landlord and Tenant—Violent Profits.—The subrent payable to the principal tenant of a farm is not conclusive evidence of the value against the tenant in a question of violent profits.

May 17. 1827.
2D DIVISION.
Ld. Cringletie.
F.

IN the actions of reduction and violent profits at the instance of the Duke of Buccleuch against the Queensberry tenants, it was settled by an interlocutor of the Lord Ordinary in the case of Halscar, which was taken as the leading case, that the violent profits were to be estimated at such rent as the farms 'could 'reasonably enable a tenant to pay.' Proceeding on this principle, condescendences were given in by the Duke in the several cases, in some of which he fixed on the subrent payable to the principal tenants, while in others, rejecting the subrent, he insisted on a proof of the value of the farms, and several cases were accordingly settled in the Jury Court by a verdict on evidence of the value.

In the present action his Grace demanded that the violent profits should be calculated according to the subrents payable to the tenants, and which they did not deny to have been paid by the subtenants.

To this it was answered by the tenants and the executors of the late Duke of Queensberry, who had sisted themselves as defenders in the action, That the subrents were not necessarily to be taken as absolute proof of what a tenant could reasonably pay for the lands; and they offered to prove that the subrents in this case were greatly too high, and could not have been made from the lands, but, if paid at all, must have been paid by the subtenants from other sources.

The Lord Ordinary found 'that in this case the subrent is 'not the conclusive evidence of what is a reasonable rent of the 'lands,' and appointed the cause to be enrolled, 'that measures 'may be taken for ascertaining the value.' The Duke of Buccleuch reclaimed, but the Court adhered.

J. HOME, and J. GIBSON jun. W. S.—LAMONT and NEWTON, W. S.—Agents.

DUKE of BUCCLEUCH and QUEENSBERRY, Pursuer.—*Jeffrey—Dundas.* No. 305.

Mrs. ANNE PRINGLE or M'MURDO, Defender.

EXECUTORS of the late DUKE of QUEENSBERRY, Defenders.—*Murray—Cockburn—Cay.*

Judicial Remit.—Circumstances in which a report by persons of skill, on a remit before answer, was held not to bar the parties from resorting to other proof.

May 17. 1827.

2D DIVISION.

Ld. Cringletie.

F.

THIS was a case similar to the preceding, (which see); but it involved an additional question. In an early stage of the proceedings, in relation to the claim of violent profits, and after an interlocutor had been pronounced ordering a condescendence by the pursuer as to the amount of his claims, a minute was given in by him to the Lord Ordinary, setting forth the rule for estimating the violent profits, as found in the leading case of Halscar, (mentioned in the preceding case,) and stating that it was now necessary that it should be ascertained, by decreet of this Court, what was the rent which the lands of the several tenants would reasonably have enabled a tenant to pay from the period when the bona fides was held to have ceased, till the tenant's removal from the farms; and 'that, for this purpose, the most 'expedient and satisfactory mode of proceeding might be, before 'the pursuer give in the condescendence ordered, that his Lord-'ship remit to persons of skill to inspect the said lands, and report 'their opinion of the yearly worth thereof for the above-men-'tioned period.' It was therefore prayed that his Lordship would be pleased, before answer, to remit 'to certain persons named to 'inspect and survey the said lands, and report to his Lordship 'what, in their opinion, would have been the rent which the said 'lands could reasonably have enabled a tenant to pay during the 'foresaid period.'

A remit was accordingly made, and a report returned, specifying what rent, in the opinion of reporters as given on oath, the several farms could reasonably have enabled a tenant to pay. Thereafter the pursuer gave in a condescendence, in which he estimated the violent profits according to the rents payable by the subtenants; while the executors of the Duke of Queensberry, who had sisted themselves as defenders, claimed in their answers that the valuation of the reporters should be taken as the basis for ascertaining the amount of violent profits.

The Lord Ordinary having found that neither the subrent nor the report was conclusive evidence of what was a reasonable rent for the lands, and having appointed the cause to be enrolled, that

measures might be taken for ascertaining the value, both parties reclaimed,—the pursuer in so far as the subrent, and the defenders in so far as the report, was found not to be conclusive evidence of the value; and the defenders pleaded as to the latter point, that the pursuer having consented to a remit to persons of skill, could not now resort to any other mode of proof.

To this it was answered, That the remit was before answer, and was not intended to determine definitely the value of the lands, but merely to procure a report which might prove useful as one mean of ascertaining what the value was.

The Court adhered to the Lord Ordinary's interlocutor.

Their Lordships stated that they had no intention to interfere with the principles laid down in the cases of Rowat, &c. quoted by the defender, which they considered to be well decided, but not to apply to the circumstances of this case.

Defenders' Authorities.—Cooper, Jan. 18. 1820, (F. C.); Thomson's Representatives, Nov. 12. 1824, (ante, Vol. III. No. 202); Dixon *v.* Monkland Canal Co., June 29. 1825, in H. of L.; Rowat, Nov. 17. 1826, (ante, Vol. V. No. 10.)

J. Home, W. S.—Gibson and Hector, W. S.—Lamont and Newton, W. S.—Agents.

No. 306.

W. Hunter, Pursuer.—*D. of F. Moncreiff—Maitland—Whigham.*

Executors of Duke of Queensberry, Defenders.—*Jeffrey—Murray—Cay.*

Process—Judicial Remit.—Held, in special circumstances, that a tenant whose lease had been reduced as ultra vires of the granter, and who, in his condescendence in an action of damages against the granter's executors, had agreed to estimate the damages according to a valuation made on a judicial remit by two persons of skill, was entitled to enlarge his claim in a revised condescendence.

May 17. 1827.

2d Division. Ld. Cringletie. F.

This was a special case. It was an action of damages at the instance of one of the Queensberry tenants, whose lease had been reduced, as contrary to the Queensberry entail, against the executors of the granter, and who had in his condescendence agreed to estimate his damage according to a valuation as to what was a reasonable rent for his farm, made by two persons under a judicial remit from the Lord Ordinary. Before, however, the condescendence was answered, he had declared his intention not to abide by it; and having, in his revised condescendence, enlarged his claim of damages, the question came to be, whether, under the peculiar circumstances of the case, he was entitled to do so, and to insist on other proof of the value of his farm being taken; and whether the objection to his doing so had not been passed from in the course of a correspondence with the executors.

The Court, considering that the judicial remit in this case was not intended to bind the parties as to their claims of damages, and that the defender had not closed with the offer in the pursuer's condescendence, found, on the report of the Lord Ordinary, that the pursuer was not barred from enlarging his claim in his revised condescendence, and remitted to his Lordship to proceed accordingly. *

The Court, as in the preceding case, expressly stated that it was merely in consideration of the special circumstances that they held the principles of the decision in the case of Rowat (ante, Vol. V. No. 10.) not to apply; but that there was no intention to interfere with the principles laid down there, and in the other cases quoted by the defenders.

F. and J. Brodie, W. S.—Lamont and Newton, W. S.—Agents.

R. Mackenzie, W. S. Pursuer.—*Sol.-Gen. Hope—Ivory.* No. 307.
Charlotte Fraser and Others, Defenders.—*Cuninghame.*

Husband and Wife—Bill of Exchange.—A married woman, whose husband resided abroad, having drawn and indorsed a bill which was accepted by the party drawn on, and the indorsee having brought an action against both the drawer and her husband, (neither of whom appeared,) and against the acceptor—Held that the indorsee was entitled to pursue the acceptor; and that, as decree passed in absence against the drawer and her husband, the acceptor was bound to pay.

May 18. 1827.

1st Division. Lord Meadowbank. D.

Mrs. Hutchison, a married woman, who carried on business as a milliner to a small extent in Inverness, and whose husband resided in England, (but from whom she was not separated either by contract or otherwise,) drew a bill upon Charlotte Fraser, who accepted it. Mrs. Hutchison then indorsed it to one Geddes, who indorsed it to the pursuer Mackenzie. Founding on this bill, Mackenzie brought an action against Mrs. Hutchison and her husband, and also against Fraser, concluding for payment of the amount of the bill. No appearance was made for Mr. and Mrs. Hutchison; but Fraser appeared, and contended,

1. That as Mrs. Hutchison was a married woman, the bill which had been drawn by her became, from the moment of its acceptance, the property of her husband; and therefore, as she could not lawfully indorse the bill without his consent, the pursuer had no title to it; and,

2. That the bill itself, as a ground of liability against Mrs. Hutchison, being, like all other personal contracts of a married

* A similar decision was pronounced in another case of Dalziel *v.* the Queensberry Executors.

woman without consent of her husband, null and void, Mackenzie could maintain no action upon it, and consequently she (Fraser) was entitled to be assoilzied.

To this Mackenzie answered,

1. That as Mrs. Hutchison carried on business for herself, and as her husband was abroad, she was entitled to transact as if she were unmarried; and at all events, as neither she nor her husband had made appearance, he was entitled to decree against them, and consequently the defender was in perfect safety to pay to him; and,

2. That in the situation in which Mrs. Hutchison was placed, she had power to bind herself, and enter into valid contracts; and besides, the bill was a good voucher of debt against the defender.

The Lord Ordinary, after advising memorials, making up a record, and advising Cases, assoilzied the defenders, but found no expenses due.

Mackenzie having reclaimed, the Court, without requiring his counsel to make any observations, and after hearing the counsel for the defender, altered, and decerned in terms of the libel.

Lord President.—I cannot see on what ground the Lord Ordinary has assoilzied the Hutchisons. They have made no appearance, and decree in absence must pass as a matter of course against them. But if decree be pronounced against them, there is an end of the case. Perhaps Mrs. Hutchison could not bind herself, but she could draw for behoof of her husband; and as the decree fixes the liability upon him, the ground-work of the defence is removed.

Lord Balgray.—The case is perfectly clear. Here all the parties are brought into the field, and they all admit the debt. The defender is as much liable as in the case of a cautioner for a minor.

Lord Craigie.—I am entirely of the same opinion, and, independent of the decree against the Hutchisons, I think the defender is liable. In the case of a cautioner for a minor, it is not enough to say that the minor is not liable; but here the defenders' plea is just to the same effect.

Pursuer's Authorities.—1. Ersk. 6. 25; 2. Bell, 172; Churnside, July 11. 1788, (6062); Chitty on Bills, 36. and 34; Thomson on Bills, 237; 2. Roper, 128; Bayley, 39.

Defenders' Authorities.—1. Ersk. 6. 25; Bayley, 40; 2. Bell, 171; Lennox and Co., May 19. 1821, (ante, Vol. I. No. 21); 1. Campbell, 485.

R. Mackenzie, W. S.—Æ. Macbean, W. S.—Agents.

W. Wilson, Suspender.—*Robertson.*
J. Dalziel, Charger.—*Shaw.*

No. 308.

Lord Ordinary refused bill of suspension, but Court passed.

May 18. 1827.

J. Murdoch,—C. Fisher,—Agents.

1st Division Bill-Chamber. Lords Mackenzie and Corehouse. D.

Representatives of John Innes, Pursuers.—*Jeffrey—Skene.*
Earl of Peterborough's Executors, Defenders.—*Fullerton—Lumsden.*

No. 309.

Warrandice, Construction of a Clause of.—By lease dated the 28th of August 1794, (mentioned ante, Vol. II. No. 31,) entered into by the late Earl of Peterborough and the late Francis Russell, Esq., to which Mr. Innes subsequently acquired right, the Earl let to Mr. Russell the lands and barony of Durris and others, comprehending a large tract of country, amounting to about 32,000 acres, 'all lying within the county of Kincardine 'aforesaid, and in so far as the said Earl has or can pretend to 'the said subjects, he not being obliged to warrant or make out 'his title to any particular part, and that for the full period, 'endurance, and term of four times nineteen years, or the space 'of 76 years, and thereafter for the lifetime of the tenant or 'lessee in possession, and that from and after Whitsunday 1794, 'thenceforth to be peaceably occupied and possessed by the 'said Francis Russell and his foresaids during the whole fore-'said space; which tack or lease, and the quiet and absolute pos-'session and enjoyment under the same, during the whole space 'or term before mentioned, subject to the payment of the rents, 'and performance of the obligation herein after specified, he the 'said Earl binds and obliges himself, his heirs and successors 'whomsoever, to warrant to the said Francis Russell, and his 'heirs and successors, and assignees and subtenants above written, 'at all hands, and against all deadly; excepting from the war-'randice the current tacks on the said estate,' &c.

May 18. 1827.

2d Division. Ld. Cringletie. F.

By agreement, of the same date with the lease, between the Earl and Mr. Russell, the Earl agreed to restrict the rent, payable to himself during his own life, to £300 yearly, and in consideration thereof Mr. Russell bound himself to pay to the Earl the sum of £15,107. 14s. Further, the Earl bound himself to grant all such deeds as might be judged to be necessary by Mr. Blair, then Solicitor-General, or by any other gentleman holding

that office, for securing to Mr. Russell and his foresaids the possession of the said lands and estate during the period of the lease, for payment of the rents therein stipulated, 'and in general 'the benefit intended for him and his foresaids by his agreement 'with the said Earl, as stated in the said lease and these presents, 'according to the spirit thereof, as it shall appear to the said 'learned counsel that the same should have been carried into exe-'cution, though the mode may be different from what has now 'been followed, provided that the Earl shall grant no more in 'substance than he has done by the said lease and these presents, 'and the deeds hereby referred to, and that he shall in no case or 'event be obliged to restore the money paid to him, or any part 'thereof; without prejudice, however, to the usual effect and im-'port of the obligation of warrandice in the said lease contained.'

This lease having been set aside in an action of reduction at the instance of a succeeding heir of entail,* Mr. Innes raised the present action, (now insisted in by his representatives,) founded on the warrandice in the lease, against the executors of the Earl of Peterborough, the granter, who contended that the whole transaction was a fraud against the entail, of which both parties took the risk, and that the clause of warrandice, taken altogether, did not in reality infer an obligation to warrant.

The Court, on the report of the Lord Ordinary, found the defenders liable under the warrandice in the lease, and remitted to his Lordship to hear parties as to the amount of damage.

The Lord Ordinary observed in a note:—With respect to the different clauses in the lease, he is of opinion that the one which occurs first in that contract, declaring that the Earl shall not be obliged to warrant, or make out his title to any particular part of the subjects let, when taken in combination with the broad one of absolute warrandice of the lease, and the possession and enjoyment of it during its whole space, can mean nothing but that such a large territory, comprehending different baronies, having been let, it might happen that some particular spot or part of it might either not belong to the Earl, or be encumbered with servitudes interfering with Mr. Russell's possession, in which case the Earl did not mean to be liable for warrandice; but that the above clause cannot be construed to abolish and evacuate the other absolute warrandice applicable to the whole. Such would be the construction of the two clauses in the lease itself; but certainly there is another qualification of that warrandice, arising from the cotemporaneous agreement. The Lord Ordinary's idea, however, is this:—Lord Peterborough seems to

* See ante, Vol. II. No. 31, and Innes v. Mordaunt, 1. Shaw's Appeal Cases, 38.

have been caught by the prospect of getting into his hands immediately a sum of £15,000, and, with this in contemplation, entered into the lease. The obligation in that contract was imposed on himself, 'his heirs and successors whomsoever;' but when he began to reflect, that if the lease should be found to go beyond his powers to grant, and that thereby he would be bound to repay the very money which it had been his object to obtain, he wished to avoid that contingency, which was to touch himself personally, and therefore got inserted the clause, that, whatever might happen, he (but 'not his 'heirs and successors whomsoever,' on whom the warrandice of the lease was imposed) 'should in no case or event be obliged to restore 'the money paid to him; without prejudice, however, to the usual 'legal effect and import of the obligation of warrandice in the said 'lease.' When, therefore, that clause was obligatory on Lord Peterborough, his heirs and successors whomsoever, and he only declared that it should not affect himself, without prejudice to its usual effect and import, the Lord Ordinary can see no other meaning than that the warrandice was not to affect himself personally, but was left in full force against his heirs and successors whomsoever. It was to the same effect as if his Lordship had said, 'I want £15,000, and 'my obtaining that sum is the cause of my contracting with you. 'You must take your chance of the bargain, in so far as I am per-'sonally concerned; but when I am gone, you may get and take 'what you can from my heirs and successors, in case the lease be set 'aside.' The Lord Ordinary can put no other construction on the whole than this. He is quite aware of the rule of law, that warrandice is not to be extended by implication; but he is clearly of opinion that warrandice, to a certain extent, was in this case intended and given, and he has put on the whole the interpretation which to him seems just. He gave the parties this opinion after hearing them, and would have pronounced an interlocutor to that effect; but thinking, in a complex question like this, it would be doing them and the Court more justice to enable their Lordships to judge of it on Cases than on a hearing by a note, he agreed to give Mr. Innes the benefit (if any be) of his opinion, by communicating it in a note prefixed to an order for Cases.

The Judges concurred.

T. Innes, W. S.—M'Kenzie and Innes, W. S.—Agents.

No. 310. R. BANNATYNE and Others, Petitioners.—*Cowan.*

Minor—Curator Bonis.—The appointment of a curator bonis being remedium extraordinarium, the Court will not interfere where the minor can choose his own curators.

May 19. 1827.
1ST DIVISION.
D.

ON the 21st of February 1826 the Court granted warrant of sale in a process of cognition and sale of the estate of Coudam at the instance of the petitioners, at which time some of the petitioners were pupils, and a factor loco tutoris had been appointed to them; but, as they had now arrived at puberty, they applied for the appointment of a curator bonis to concur with them in the sale, and in granting a title to the purchaser. The Court, however, having expressed an opinion, that as it was competent to the minors themselves to choose curators, and as an appointment of a curator bonis was a remedium extraordinarium, the application was incompetent, the petitioners withdrew the petition.

HUNTER, CAMPBELL, and CATHCART, W. S. Agents.

No. 311. IRVING, Suspender.—*G. G. Bell.*
BURNETT, Charger.—*Gillies.*

Process.—Held incompetent, after a bill of suspension has been passed, and the letters expede, to reclaim against the interlocutor passing the bill,—the remedy being a petition and complaint to recall the letters, if they have been irregularly expede.

May 19. 1827.
1ST DIVISION.
Bill-Chamber.
Ld. Corehouse.

IRVING having presented a bill of suspension and liberation, the Lord Ordinary, on advising answers, passed it. Irving's agent thereupon immediately borrowed the process, and got the letters expede, in virtue of which Irving was liberated. Burnett then presented a reclaiming note, to the competency of which it was objected, That as the letters had been expede, the case was now out of the Bill-Chamber.

To this it was answered, That as Burnett was entitled to 24 hours at least from the period of passing the bill before the letters could be expede, an irregularity had been committed in doing so, and therefore he was still entitled to be heard.

The Court refused the note as incompetent.

LORD BALGRAY.—As the letters have been expede, and have passed the signet, we cannot do any thing in this process in the Bill-Chamber. If there has been any irregularity, the proper course is to present a petition and complaint, praying to have the letters recalled.

LORD COREHOUSE.*—I am entirely of the same opinion.

LORD CRAIGIE concurred.

* In consequence of the absence of the Lords President and Gillies, Lord Corehouse was called in to form a quorum.

J. HAY, Pursuer.—*Neaves.* No. 312.
R. GRANT and J. SMITH, Defenders.—*J. W. Dickson.*

Proof—Onus Probandi—Sale.—A party having bought certain goods, and, after an action had been brought for payment, having returned part of them to the trustee on the seller's sequestrated estate, to be sold by him—Held that the onus of proving a condition that the price effeiring to the goods so returned was to be considered as thereby discharged, lay on the purchaser.

May 19. 1827.
2D DIVISION.
Lord Medwyn.
F.

HAY, the trustee on the sequestrated estate of Elder, carver and gilder in Edinburgh, having raised an action against Grant and Smith for payment of certain goods purchased by them from Elder, they returned part of the goods to Hay, who received them, and afterwards sold them, deducting from his claim against the defenders the price obtained for the goods so returned, but without giving any discharge of the action, or a receipt in full as to the price of these goods. The defenders, however, contended that they were entitled to be assoilzied from the demand for the price of the goods returned, on the ground that it was intended by the parties to put an end to the bargain as to these goods.

The Lord Ordinary found, 'That the onus of proving the allegation that the goods so returned were returned and received 'in full of the pursuer's claim against the defenders, except as to 'the goods not returned, lies upon the defenders; and as it is 'stated by their counsel that they have no proof to offer in support of this allegation,' his Lordship decerned for the amount as restricted by the pursuer; and the Court, without calling on the pursuer's counsel to answer, unanimously adhered.

J. SMITH, Agent.

W. DURHAM, Advocator. No. 313.
HELEN GUTHRIE, Respondent.

Proof—Semiplena Probatio—Filiation.—Circumstances held not sufficient to amount to a semiplena probatio in an action of filiation.

May 19. 1827.
2D DIVISION.
Lord Medwyn.
M'K.

THIS was an action of filiation and aliment of a bastard child, brought by the respondent Helen Guthrie against the advocator Durham before the Justices of the Peace of Ayrshire. From the evidence led in the Inferior Court, it appeared that Durham, who was a mason in Girvan, had been employed, in the spring of 1824, in building a house in Girvan, close to that of the respondent's father, where he used frequently to go to light his pipe, and to sit sometimes in the evening after his work was over, the respondent being at the time resident with her father; but no per-

son who had seen the advocator and respondent together, ever saw any familiarity or indecent behaviour betwixt them. One witness, however, deponed, that on an evening in April 1824, after quitting work in Girvan Mains quarry, where the advocator also was working, he saw the advocator coming along the road from the quarry towards the main road, but that he stopped within the hedge on the side of the main road;—that, in about a quarter of an hour, he observed a woman coming along the main road, who turned down the quarry road, and was joined by the advocator, and that they both walked down the quarry road towards the quarry;—that the witness, thinking, from the plaid the woman wore, that it was one of his own daughters, walked slowly along the road towards Girvan, stopping occasionally that they might overtake him, and that, about an hour after he first saw them, (being now between seven and eight o'clock,) he saw the advocator, accompanied by a woman, coming through some fields into the main road;—that he watched at the end of a smithy till they should pass;—that he then recognised the woman to be the respondent Helen Guthrie, but that he did not know whether she was the woman whom he saw going down the quarry road with the advocator, but she appeared to have the same dress, and she had on a plaid which he thought belonged to his wife. It had further appeared that the advocator, having been interrogated on a judicial examination whether, in spring 1824, he was in company with the respondent in a park in the farm of Girvan Mains, he had declared that he was not, and that he never met or passed her to his knowledge while he was returning from Girvan Mains quarry to the town of Girvan.

On this proof the Justices found that there was a semiplena probatio, and allowed the respondent's oath in supplement; but, in an advocation, the Lord Ordinary found that she had 'not proved 'facts and circumstances sufficient to have entitled her to her oath 'in supplement,' and assoilzied the advocator; and the Court adhered.

LORD ALLOWAY thought that the evidence adduced, coupled with the advocator's denial of his having met the respondent, contrary to the evidence of one of the witnesses, amounted to a semiplena probatio; but the other Judges concurred with the Lord Ordinary.

GAIRDNER and ROBERTSON, W. S.—A. KENNEDY, W. S.—Agents.

J. COCHRAN, Suspender.—*Robertson.*
J. SIMPSON, Charger.—*Maidment.*

No. 314.

THIS was a special case, in which the Lord Ordinary refused a bill of suspension, and the Court adhered.

May 22. 1827.

1st DIVISION.
Bill-Chamber.
Lds. Mackenzie and Corehouse.

J. STUART,—J. BURN, W. S.—Agents.

JAMES and ISOBEL CHALMERS, Pursuers.—*Baird.*
D. CHALMERS, Defender.—*More.*

No. 315.

Clause—Destination.—A father having disponed, mortis causâ, his properties in several parcels to his children of a first marriage in liferent, and their issue in fee; and certain other parcels to the children of his second marriage, and their heirs, in fee; and having subsequently provided, that in case of any of his children predeceasing him, his or her share should accresce to the survivors, but without prejudice to the above destination; and a child of the second marriage having predeceased him—Held that her share fell to her brother as her heir.

THE late Thomas Chalmers, who was proprietor of several heritable subjects, had three children—James, Isobel, and William, by a first marriage; and two—Jean and David, by a second marriage with Margaret Johnstone. During the subsistence of this marriage he executed, on the 5th of October 1811, a disposition and deed of settlement, by which he disponed 'to and in favour 'of my wife and children after named, and their lawful issues, 'my heritable subjects in the proportions and divisions follow-'ing, viz.

'To James Chalmers, (one of the pursuers,) my eldest son, in 'liferent, for his liferent use allenarly, and to the child or child-'ren, equally, lawfully procreated of his body, in fee, all and 'whole' certain tenements in the town of Glasgow, particularly described.

'To William Chalmers, my son, in liferent, for his liferent 'use allenarly, and to the child or children, equally, lawfully pro-'created of his body, in fee, all and whole,' &c.

'To Isobel Chalmers, (one of the pursuers,) my daughter, in 'liferent, for her liferent use allenarly, and to the child or child-'ren, equally, lawfully procreated of her body, in fee, all and 'whole,' &c.

'To Jean Chalmers and David Chalmers, my daughter and 'son, equally between them, and their heirs and successors,' in fee, all and whole, &c.

May 22. 1827.

1st DIVISION.
Lord Meadowbank.
D.

'Lastly, I hereby dispone and convey from me and my heirs, 'to and in favour of any future child or children that may yet 'be procreated of the marriage between me and the said Mar- 'garet Johnston, and their heirs whomsoever, equally between 'them, whom failing, to and in favour of the said William Chal- 'mers and Isobel Chalmers, equally in liferent, and to their child- 'ren in fee, all and whole,' &c.

After imposing certain burdens on his children, he introduced the following clause :—

'Provided always, as it is hereby expressly provided and de- 'clared, that in the event of the decease of any of my children 'without lawful issue, the share or shares of such deceaser or de- 'ceasers shall accresce and belong to the survivors or survivor 'of them equally in liferent, and to their lawful issue in stirpes 'in fee, but without prejudice to the former destinations.'

Subsequently to the execution of this deed, he had another child by Margaret Johnstone.

Jean, one of the children of the second marriage, predeceased her father without issue ; and he having died in 1815, her brother David, as her heir, took up the subjects which had been disponed to her. At the distance of several years thereafter, James and Isobel Chalmers (who were now the only surviving children of the first marriage) brought an action concluding to have it found that the share of Jean was, by the provision in the disposition, destined to the survivors in liferent, and their issue in fee; and that they had right, accordingly, along with the children of the second marriage, to these subjects. The question therefore came to be, Whether the destination to the heirs and successors of Jean Chalmers was qualified by that subsequent provision?

The Court, on the report of the Lord Ordinary, found that the subjects belonged to David as heir of his sister, and therefore assoilzied him.

Their Lordships were unanimously of opinion, that it was perfectly clear, under the qualifying terms, 'but without prejudice to the 'former destinations,' that the provision as to the shares of deceasing children accrescing to the survivors could not affect the previous destination to the heirs of Jean Chalmers.

J. Macandrew,—W. and A. G. Ellis, W. S.—Agents.

P. Scott, J. Bonar, and Others, Pursuers.—*More.*
W. Drysdale, W. S. Claimant.—*Baird.*

No. 316.

Process—Multiplepoinding.—Held, that although there was only one arrestment, yet, as there were competing interests for a debt, a multiplepoinding was competent.

May 22. 1827.

1st Division. Lord Meadowbank.

John Sword, William Sword, James Latimer, and others, who were joint owners of a vessel of which John Sword was the ship's-husband, having got involved in a dispute, entered into a submission for the purpose of having it settled. The arbiter, on the 7th of January 1819, pronounced a final decree, by which he found William Sword liable to John Sword in £600, and Latimer in about £160; but declaring, that in the event of William Sword being unable to pay the £600, then it should be competent to John Sword to recover it from Latimer and the other owners. Latimer paid the sum which was awarded against himself, and in February 1819 he sold his share of the vessel for £210 to John Sword, who, together with Peter Scott and John Bonar, granted a bill for the amount, payable twelve months after date. At this time no measures had been taken to recover the £600 for which Latimer was contingently liable, and it was therefore agreed that the bill should be deposited with the arbiter, until it should be ascertained whether this contingent claim by John Sword against Latimer would arise.

In July 1823, Mr. Drysdale, writer to the signet, who was a creditor of Latimer, arrested in the hands of Scott and Bonar, as indebted under the bill to him, and he thereupon raised a process of multiplepoinding in their name. After the usual interlocutor had been pronounced, and the arbiter had lodged the bill in process, and an order had been issued against Scott and Bonar to consign the amount, they entered appearance, and objected to the competency of the process, particularly to the order for consignation. The Lord Ordinary repelled the objection; but the Court altered, so far as related to the order for consignation, and remitted to his Lordship to hear parties on the other points of the case, (see ante, Vol. III. No. 361.) The case having accordingly returned to the Lord Ordinary, Scott and Bonar maintained, that as there was no double distress—Mr. Drysdale being the only arresting creditor—and as they denied that the full amount of the bill was due, it was incompetent to raise a process of multiplepoinding, and thereby to constitute and obtain decree against them.

To this it was answered, That as the bill was in the hands of a third party (the arbiter,) and as it might possibly be claimed

by John Sword, or by Latimer, there were competing interests, so that a process of multiplepoinding was the proper form for having the rights of parties to the bill ascertained.

The Lord Ordinary dismissed 'the process of multiplepoinding which was raised in the name of Peter Scott and others in the character of pursuers, but were only nominally so, as incompetent, reserving to William Drysdale, writer to the signet, who has made an appearance, and produced an interest in the process as a competing party, and carried on the proceedings accordingly, to bring an action of furthcoming, or such other process as he may be advised to bring, for payment of the claim made by him, and found him liable in expenses.' Mr. Drysdale having reclaimed, the Court (without hearing his counsel) unanimously altered the interlocutor, sustained the process as competent, and remitted to the Lord Ordinary to proceed accordingly.

J. Singer, W. S.—Gibson and Oliphant, W. S.—Agents.

No. 317.

J. Phin.—*Skene—Marshall.*
Magistrates of Auchtermuchty.—*Cheape.*
Officers of State.—*Sol.-Gen. Hope—Wood.*

Competing.

Burgh Royal—Res Judicata.—A Royal Burgh having become insolvent, and a decree of adjudication of its whole property having been obtained in foro by a creditor—Held, in a ranking and sale brought by the creditor,—1.—That the decree of adjudication was not such a res judicata as to prevent the Magistrates from opposing the sale of certain parts of the property which had been adjudged;—2.—That the Crown had a right to appear and object to the sale of the jail and town-house;—and,—3.—That it is incompetent for creditors to sell the jail and town-house, with its steeple and its bell, or the petty customs of a Royal Burgh.

May 22. 1827.

2d Division. Lord Newton. M'K.

The Royal Burgh of Auchtermuchty having fallen into a state of insolvency, Mrs. Arnott, a creditor, raised an action of adjudication of the whole property of the burgh. In this process, in which the Magistrates made appearance as defenders, decree of adjudication was pronounced by the Lord Ordinary, and was allowed to become final. Instead, however, of following up the adjudication, by obtaining a charter and sasine, Mrs. Arnott brought a ranking and sale, in which Mr. Phin was appointed common agent. In the usual memorial and abstract given in, there were included among the subjects sought to be sold the town-house and jail, with a large bell erected in the steeple of the town-house, which could not have been removed without taking down some part of the steeple, and also the petty customs of

the burgh, which were leviable by the Magistrates at the markets under a royal charter, giving them power to regulate the amount of the dues. To the sale of all these subjects objections were made on the part of the Burgh; and appearance was also made for the Officers of State on behalf of the Crown, who objected to the sale of the town-house and jail, which was, however, in a very decayed condition.

On these objections the Lord Ordinary appointed Cases to the Inner-House by the three parties, the Magistrates, the Officers of State, and the common agent.

It was contended by the Officers of State and by the Burgh,

1. That the right of levying petty customs, and the consequent regulation of their amount, granted to the corporation by their charter, was in its nature inalienable, and could not properly be exercised by an individual.

2. That burghs were bound by the act 1579, c. 273, to provide jails, and that it was incompetent to allow creditors to deprive it of that which was held by them for the public behoof, and was necessary for the performance of the obligations imposed on them by law; and,

3. That the town-house and jail formed in fact one building, of which the bell was a part, and that, besides, they were res universitatis, and necessary for the Magistrates in the exercise of their office.

On the other hand, it was pleaded for the common agent,

1. That rights of tolls, ferries, fairs, and the like, had frequently been found to be attachable by creditors from private individuals, and that the circumstance of such rights being granted to communities could not affect their liability for the debts of the community; and further, that in the case of Dysart the profits of the hand-bell of the town had been found to be carried by an apprising at the instance of a creditor of the burgh.

2. That the obligation on the burgh to maintain a jail was personal, which if it could not be performed, the corresponding privileges might be abandoned, but could not preclude creditors from attaching property feudally vested in the Magistrates, and purchased with their funds, and which they might have voluntarily sold, and indeed is not unfrequently sold by burghs,—more especially as the jail, in the present case, was almost entirely useless from the state of decay in which it was.

3. That the town-house, and particularly the bell, were in no ways essential to the performance of any public duty on the part of the Magistrates; and,

4. That, at all events, the final decree of adjudication in favour

of the pursuer of the ranking and sale, which included the subjects in question, formed a res judicata in the present case.

The Court found that the subjects objected to must be struck out of the sale.

Lord Glenlee.—I am inclined to sustain the objections. The burgh is bound by its station to have these things as long as it remains a royal burgh, to perform the public duties incumbent on it by statute. And I can see no more reason for allowing creditors to take them away, than there would be for permitting the creditors of an officer in the army to attach his arms and accoutrements, which, though purchased with his own money, are necessary for the performance of his public duty.

Lord Pitmilly.—As to the plea of res judicata, I should be sorry if the decree of adjudication which I pronounced in the Outer-House, without the discussion which has since taken place, should have that effect. But the Crown were not parties to that process, and besides, the decree is in fact little more than the title to proceed in this ranking and sale. As to the merits, I doubt extremely the right of creditors to attach these subjects, which the very circumstance of the attempt to attach them proves cannot be renewed by the burgh. I conceive they are res universitatis, and not the proper subjects of commerce; and indeed they are enumerated by Erskine as such. The burgh could not sell these subjects voluntarily, except in the case of their having provided new ones for the use of the burgh, when they might dispose of the old buildings no longer used as a jail, &c., and if the burgh could not sell, it necessarily follows that creditors cannot attach them. The salary of public officers cannot be attached to the extent of preventing them from performing the duty for which the salary is given; and in like manner the buildings, &c. of a burgh destined for public purposes, cannot be attached so as to defeat the purposes for which they have been established.

Lord Alloway.—I have considerable doubts in this case. The adjudication has become final, and I think that that decides the matter in a question with the burgh; but the Officers of State, who were no parties to the process of adjudication, have now come forward, which raises a question as to their right and interest. I have no doubt of their right to protect the public whenever they can show an interest on the part of the public; and if they could maintain here that it is necessary for the public interest that the burgh of Auchtermuchty should have a jail, I would agree that they also had a sufficient interest to make the objections in which they now insist. But considering the vicinity of this burgh to Cupar, where there is a sufficient jail, and that the funds of the burgh are confessedly in such a state as not to enable them to repair the present jail, so as to make it capable of use, I really cannot see that the Crown has a sufficient

interest to interfere, though I do not doubt its right; and then the decree of adjudication, which I think was quite right, is final and conclusive in this question as against the Magistrates. As to the petty customs, the only decision in our books is much stronger than this, viz. the case of Dysart, where the bellman's privilege was adjudged. We have also instances of adjudication of similar rights from individuals, and even of the right to elect the magistrates of a burgh in the case of Sinclair of Ulbster. I do not see how we can distinguish between individuals and corporations.

LORD JUSTICE-CLERK.—This burgh of Auchtermuchty, though without the privilege of voting for a member of Parliament, is a regular royal burgh, and as such possesses a jail and town-house with a bell which may be used not merely as a church bell, but for convocating the burgesses. It is important, in reference to the plea of res judicata, that there is no attempt on the part of the creditor adjudging to follow up her adjudication with charter and sasine; but that this is a ranking and sale, in which appearance is made for the Magistrates and the Officers of State. The Crown has clearly a right to insist that every royal burgh shall be maintained in statu quo under the royal grant; its interest is inherent in the nature of the thing, and consequently does not allow of any inquiry as to the utility of keeping up a jail in any particular burgh; for, as long as it remains a burgh, it has certain duties by law to perform, for which the jail is necessary. The Crown, therefore, having a clear right and interest, and not having been a party to the process of adjudication, I can have no doubt of its title here. But further, as this is not a proceeding following out the adjudication, which has only been used as a step to the ranking and sale, I conceive that the Magistrates also are entitled to appear and object. Then, on the merits, I am satisfied that the jail and town-house being necessary for the performance of the public duties of the Magistrates, is public property, and not subject to commerce; and I am therefore clear that it cannot be sold. As to the petty customs, there is still less difficulty. A right of levying customs in a burgh is totally different from a right of ferry; and as the grant gives a power of modification, intrusted to the corporation or its Magistrates, it is impossible to allow that to be exercised by an individual. If the customs are not to be levied by the burgh, the lieges must be freed from them entirely; and if they are to remain exigible, the burgh alone can exact them. I am therefore of opinion that all the articles objected to must be struck out of the sale.

Common Agent's Authorities.—3. Stair, 2. 16; 1. Bell, 21; Lord Kennet, March 1. 1769, (10781); Magistrates of Dysart, Jan. 1686, (140.)

J. PHIN, S. S. C.—T. LEBURN, S. S. C.—A. ROLLAND, W. S.—Agents.

No. 318. W. ANDERSON and Others, Pursuers.—*D. of F. Moncreiff—Ivory.*
CHALMERS and GUTHRIE, Defenders.—*Sol.-Gen. Hope—Gordon.*

May 22. 1827.
2D DIVISION.
Ld. Mackenzie.

THIS was a special case of accounting, in which the Lord Ordinary deemed according to one of two views taken by an accountant, and the Court adhered.

RITCHIE and MILLER, S. S. C.—A. STORIE, W. S.—Agents.

No. 319. D. M'KENZIE, Pursuer.—*Walker—Napier.*
W. ROBERTSON and COMMISSIONERS, Defenders.—*Forsyth.*

Adjudication—Prescription.—The Court repelled a plea of prescription founded on an infeftment on an adjudication, followed by upwards of 40 years possession, as against a reduction of a decree of expiry of the legal obtained only nine years before the action was brought.

May 22. 1827.
2D DIVISION.
Lord Pitmilly.
F.

A decree of adjudication of certain heritable subjects in Renfrew, of date the 10th of March 1768, against Matthew Walker, as lawfully charged to enter heir to his father Robert, was, in 1772, assigned to the defender's father John Robertson, who was infeft thereon, and entered into possession of the subjects. On his death, the defender expede a service, on which he was infeft; and thereafter, in 1809, he raised an action of declarator of expiry of the legal, in which he obtained decree, without, however, having called the pursuer M'Kenzie, who had previously served heir to Walker, the reverser, and obtained an infeftment thereon. Of the decree of expiry so obtained, M'Kenzie, in 1817, brought an action of reduction, to which it was pleaded in defence, That the infeftment on the adjudication in 1772, followed by upwards of 40 years possession, constituted a valid prescriptive title. To this it was answered, That the present action being for reduction of the decree of expiry of the legal, which was obtained only in 1809, it could not be barred by the previous infeftment, or possession thereon. The Lord Ordinary having repelled the defence of prescription, Robertson reclaimed; and he having brought a reduction of M'Kenzie's service to the reverser, the Court superseded advising his reclaiming petition till the issue of that reduction, (see ante, Vol. II. No. 185); but M'Kenzie having now been assoilzied in that action, their Lordships resumed Robertson's petition, and unanimously adhered to the Lord Ordinary's interlocutor.

R. URQUHART,—J. STUART, S. S. C.—Agents.

A. Scott, W. S. Pursuer.—*More.* No. 320.
Farquharson's Trustees, Defenders.—*Baird.*

Discharge—Prescription.—A creditor under an extrajudicial composition-contract, having got an obligation from the debtor to pay his full debt, but having thereafter discharged it on payment of the composition; and having afterwards got a bill for the balance due on the full debt from the debtor, which was prescribed—Held not entitled to recover under the obligation.

May 24. 1827.

1st Division. Lord Eldin. D.

The late Dr. Farquharson, having become insolvent, executed a trust-deed for behoof of his creditors, one of whom was William Scott, solicitor at law in Edinburgh, to the extent of £424, for which he ranked as an acceding creditor. Four dividends, amounting to 17s. 3d. per pound, were paid to the creditors; and on the 30th of October 1806 Scott granted a receipt to the trustee for the fourth dividend, stating that it, together 'with three other dividends formerly received, and premiums of insurance paid by 'him, I hereby acknowledge and accept of in full of the above 'debt, and engage to convey the vouchers to him in a habile 'manner, and at his expense, when required.' He accordingly delivered up the documents and vouchers of the debt. In the month of April preceding, Dr. Farquharson had written a letter to Scott, stating that it was his intention to pay him in full, and bearing that 'I hereby oblige myself to discharge my debt to you 'in full, both principal and interest.' Thereafter, in 1816, an account was made up by Scott, showing that the balance due to him was £387, and on the 1st of July of that year he drew a bill for the amount, which was accepted by Dr. Farquharson, payable one day after date. Dr. Farquharson died in June 1823, having appointed the defenders his trustees, against whom the pursuer (who was the heir of William Scott) brought an action founding on the above obligatory letter and bill.

In defence, they rested upon the discharge which Scott had granted to the trustee for the creditors, which was subsequent in date to the obligatory letter, and pleaded that the bill was prescribed.

The Lord Ordinary sustained the defences, and the Court adhered.

A. Scott, W. S.—J. Skinner, W. S.—Agents.

No. 321.

A. M'NEEL and Others, Pursuers.—*Baird.*
Mrs. ANN ROBERTSON, Defender.—*Pyper.*

Process—Execution pending Appeal.—Held incompetent for a Lord Ordinary to transfer against an executrix a warrant issued against a defunct for interim execution pending appeal.

May 24. 1827.
1st DIVISION.
Lord Eldin.
S.

IN an action at the instance of M'Neel and others against the late John Vans Agnew, Esq. judgment having been pronounced against him, with expenses, he presented a petition of appeal to the House of Lords, on which he obtained and executed an order of service. M'Neel and others then obtained a decree for the expenses, and got a warrant for interim execution; but, before they lodged answers to the petition of appeal, Mr. Agnew died. They then brought an action of wakening and transference against Mrs. Robertson, the executrix of Mr. Agnew; and decree having been pronounced, they then moved the Lord Ordinary to allow the warrant for interim execution to go out and be extracted against her. This was resisted by her as incompetent, because it was the Inner-House, and not the Lord Ordinary, who was authorized by the statute to grant interim execution. The Lord Ordinary having granted the motion, and Mrs. Robertson having reclaimed, the Court altered, and found the motion incompetent, reserving to M'Neel and others to apply to them in proper form.

J. R. SKINNER, W. S.—J. B. GRACIE, W. S.—Agents.

No. 322.

H. D. ERSKINE.—*Cuninghame.*
Major G. F. ERSKINE.—*D. of F. Moncreiff—Marshall.*

Competing.

Bond of Provision—Marriage Contract.—Circumstances in which it was found,—1.—That a younger son having obtained a bond of provision from his father, was preferable, in virtue of a power under a contract of marriage, to his elder brother, who had ratified the bond;—and,—2.—That money advanced by the father for the support of the younger son was not to be imputed in extinction of the bond.

May 24. 1827.
1st DIVISION.
Lord Meadowbank.
H.

BY a contract of marriage between the late Honourable Henry Erskine and Miss Fullerton of Newhall, he bound himself to secure the fee of the whole of his own property, of which he should die possessed, to the heirs and bairns of the marriage, reserving to himself a power of division; while, on the other hand, Miss Fullerton disponed the estate of Newhall to herself, for the purpose of selling it in the event that it should be found free of an entail, and to hold the price for behoof of the children of the marriage; but declaring, 'that the said Christian Fullerton and Henry

'Erskine, and the survivor of them, in case the said estate is 'found to be free of the said entail, or sold, shall have power to ap- 'point and ascertain the shares which the children of this marriage 'shall have of the said estate, or price thereof, after the death of 'the survivor of them;' and further, that the foresaid provisions conceived 'in favours of the children of the marriage are to be 'in full satisfaction to the said children of all legitim, &c., or 'whatever else they might ask or claim through the decease of 'the said Henry Erskine and Christian Fullerton, or either of 'them,' &c.

The trustees did not act; and Mrs. Erskine having died, leaving two sons and two daughters, her estate (which was found not to have been validly entailed) was sold to the Earl of Kellie for £34,000. Henry David Erskine, the eldest son, then made up titles to it as heir to his mother, and conveyed it to the purchaser. The greater part of the price was paid to Mr. Erskine, who executed various bonds of provision in favour of his younger children —some of them of an absolute nature—some in addition to those already provided—others depending on the contingency of his succeeding to the titles and estates of his brother, the Earl of Buchan—and others on that of the succession of his heir to them. In particular, on the 7th of January 1805, Mr. Erskine, on the narrative of the contract of marriage, granted a bond of provision for £5000 to his son, the claimant, Major George Francis Erskine, payable at the first term after his death, and declaring that it should be in full of all claims under the contract of marriage, or otherwise; but reserving a power to revoke. Thereafter, in 1808, Mr. Erskine having advanced £2250 to purchase a troop in the 12th regiment of dragoons for his son George Francis, he executed, on the 4th of October, a deed of restriction, by which he diminished the provision of £5000 to that extent; but declaring that, under the said revocation and restriction, 'I hereby approbate and con- 'firm the said bond, &c. in favour of the said George Francis 'Erskine.'

Mr. Erskine having afterwards married, and purchased the estate of Ammondell with part of the price of Newhall, he executed a deed of tailzie of the former of these estates in favour of his eldest son and a series of heirs, and a relative trust-deed, in which he stated that the conveyance made by him in the entail, and a provision in the trust-deed in favour of his eldest son, 'should be in full contentation and satisfaction of his share of the 'said estate of Newhall and others, and price thereof,' and of his other conventional or legal provisions. In this trust-deed, after narrating the contract of marriage, and that the price of New-

hall stood as a surrogatum for the same, and that, in virtue of the power in the contract, he had resolved to divide it among his children, and that he had already made certain provisions in favour of his daughters and youngest son, he conveyed his estate in trust for payment 'of all debts and obligations due, owing, or 'prestable by me at my death, including the provisions to my 'wife and children;' declaring that no part of the rents of the entailed estate should belong to the heirs of entail until the purposes of the trust were exhausted.

Thereafter, on the 3d of June 1814, and on the narrative that his debts had considerably increased by making advances for his eldest son, whereby a sale of part of his estate would be necessary, and that he had resolved in certain events to annul the deed, restricting the provision to his son George Francis, he granted power to his trustees to sell part of his estate for liquidation of his 'debts and provisions in favour of my wife and 'children, as mentioned in the said trust-deed.' At the same time his eldest son Henry David executed a deed of ratification narrating all those which had been previously granted by his father, including the bond of provision to George Francis, and bearing that 'I am fully satisfied of the powers of my said father 'to make such division as he may think proper of the price of 'the said lands of Newhall and others, and also of the estate 'conquest and acquired by himself, amongst the children pro-'created between him and the said Mrs. Christian Fullerton.'

On the death of Mr. Erskine, it was found that his funds were inadequate to pay his debts. Various questions having occurred among his children, and also between them and his creditors, the trustees brought a multiplepoinding, in which the Court, inter alia, found 'that Mr. Henry David Erskine, and the younger 'children of the late Mr. Erskine, for their absolute provisions, 'are onerous creditors of Mr. Erskine for that part of the price 'of Newhall which was paid to Mr. Erskine during his life, 'and are entitled to be ranked therefor upon the fund in medio 'pari passu with the Earl of Buchan and the Earl of Kellie, 'and the other onerous creditors of Mr. Erskine,—and with Mrs. 'Erskine, the widow of Mr. Erskine, for her provisions in their 'contract of marriage,—and ranked and preferred them accordingly.' (See ante, Vol. IV. No. 252.) Thereafter their Lordships, 'in hoc statu, repelled the claim made by the younger children of Mr. Erskine for their additional and contingent provisions, and found that the heir, Mr. H. D. Erskine, is entitled, 'hoc statu, to claim the balance of the price of Newhall; reserving always to the younger children their claim for the con-

'tingent provisions when the conditions are purified, and to Mr. 'H. D. Erskine his objections thereto;' and remitted to the Lord Ordinary.

When the case returned to his Lordship, two questions arose between the eldest son Henry David and his brother Major George Francis—first, whether certain payments made to the latter by his father for his support while in the army, subsequent to the date of the bond of provision, were to be imputed in extinction of it; and, second, whether he was entitled to be ranked as a special legatee preferably to his brother on the price of Newhall, so as to recover full payment of his provision, or only along with him as an ordinary creditor.

In relation to the first of these questions, the Lord Ordinary found, 'that the payments made from time to time to the claim-'ant Major George Francis Erskine by his father cannot be 'imputed towards the claim of the said Major George Francis 'Erskine under the bond of absolute provision in his favour;' and appointed Cases to be lodged 'as to the question how far the 'younger children are entitled to claim their absolute provisions 'in full, as in a question with the eldest son,—or to suffer a pro-'portional abatement, in consequence of the shortcoming of Mr. 'Erskine's funds.'

In support of that claim George Francis maintained,

1. That there was an obligation incumbent on his brother, as the heir of his mother, to make effectual that part of the price of Newhall which had been allotted to him by the bond of provision in his favour; and,

2. That, by the deed of approbation of that bond, his brother had come under an obligation to give effect to the exercise of the power of division by his father, and so was bound to see the bond fully implemented, and, like a residuary legatee, was entitled to draw only the remaining balance of the price.

On the other hand it was maintained by Henry David,

1. That the title which he had made up to his mother was merely pro forma, and to enable the estate of Newhall to be transferred to the purchaser; and besides, both his brother and the other children were representatives of their mother to the extent of the interest claimed by each of them in the competition; and,

2. That it was not the intention of Mr. Erskine, or of the deed of ratification, that the younger children should have any preference such as that now claimed.

The Lord Ordinary having reported the Cases, and Henry David Erskine having reclaimed on the first point, the Court found, 'that the absolute provision for which Major George Francis

'Erskine has been ranked and preferred upon the fund in medio 'amounts to the sum of £2750, with interest thereof since the term 'of Martinmas 1817: That, in a question with the said Henry 'David Erskine, the said Major George Francis Erskine is en- 'titled, in the division of the fund in medio, to draw the said sum 'and interest, preferably to the said Henry David Erskine, upon 'the dividend on the late Henry Erskine's funds, corresponding 'to the balance of the price of Newhall, for which balance his 'children have been ranked as creditors in this process, without 'being liable to any deduction, either on account of any deficiency 'of the late Mr. Erskine's funds, or of advances made by him to 'his said son Major George Francis Erskine; and decern, and 'remit to the Lord Ordinary to proceed accordingly.'

H. D. Erskine's Authorities.—Arbuthnot, Feb. 13. 1756, (8080); Lownes upon Legacies, 418.

HUNTER, CAMPBELL, and CATHCART, W. S.—J. and C. NAIRNE, W. S. —Agents.

No. 323.

RICKMAN and PARRY, Pursuers.—*Forsyth—Sandford.*
J. M'LACHLAN, Defender.—*D. of F. Moncreiff—Jameson.*

Bill of Exchange.—A bill drawn in Scotland upon and accepted by a party in England, is an English debt, quoad a Scotch indorsee, equally as in a question with the acceptors.

May 24. 1827.

2D DIVISION. Ld. Cringletie. B.

SCOTT, SMITH, STEIN, and COMPANY, bankers in Edinburgh, were in use to draw bills on Kensingtons and Company of London, which bills they frequently obtained to be filled up as payee and indorser by persons (generally young lads acquainted with their clerks) having no connexion with the transaction. Three of these bills, dated in 1812, drawn by Smith, Stein, and Company upon, and accepted by Kensingtons and Company of London, were thus filled up as payable to the defender M'Lachlan (who resided in Scotland,) 'or order,' and were blank indorsed by him. The drawers and acceptors having become bankrupt, Messrs. Rickman and Parry, bill-brokers in London, into whose possession these bills had come, raised an action in 1825 for payment against M'Lachlan, who pleaded in defence, inter alia, That the bill having been accepted, and being, consequently, payable in London, was an English debt, and as six years had expired, it was subject to the English Statute of Limitations.

The pursuers, on the other hand, contended, That although, quoad the acceptors, who were bound to pay the bill in London, it was an English debt; yet, in a question with a Scotch indorser, whose obligation was to retire the bill on the failure of the En-

glish party to pay, the debt was Scotch; and they also pleaded that there were certain specialties which took this case out of the Statute of Limitations.

The Lord Ordinary ordered Cases as to one of the bills; and, as to the other two, he assoilzied the defender on another defence pleaded by him; and this judgment having been reclaimed against by the pursuer, his Lordship made avizandum with the Cases to the Inner-House, when the Court recalled the interlocutor of absolvitor,—found that the bills were English debts to be regulated by the law of England, and remitted to his Lordship to hear parties as to its effect.

LORD JUSTICE-CLERK.—It is clear that this is an English debt; it was payable in London, and the rules of the law of England must apply. We are not sufficiently aware of the effect of the English Statute of Limitations to determine the cause at present; but we must fix that it is an English debt, and that all the consequences of the law of England will apply to it.

LORD ALLOWAY.—There cannot be doubt but that a bill of exchange is a debt of that country where it is payable; and this was decided in the case of the Royal Bank in regard to bills drawn by and upon the very same parties with those which are the subject of the present action.

LORD GLENLEE.—I entirely concur. The demand is no doubt made in Scotland; but that is only because there was a failure to pay in England, which the indorser is held to guarantee shall be done.

LORD PITMILLY concurred.

Defender's Authorities.—Watson, Jan. 21. 1792, (4582); Rogers, July 25. 1732, (4507); Lord Lovat, Dec. 2. 1742, (4512); Grove, Nov. 1740, (4510); Royal Bank, Jan. 20. 1813, (F. C.)

D. FISHER, S. S. C.—J. MORISON, S. S. C.—Agents.

W. AUSTIN &c. and their Curator ad Litem, Suspenders.—*Skene—Wilson.*
H. GRANT and W. ANDERSON, Chargers.—*D. of F. Moncreiff—Shaw.*

No. 324.

Heritable Creditor.—Circumstances in which heritable creditors were held not entitled to proceed with a sale of the property under their bond, while they refused to accept payment on granting an assignation to a third party.

May 24. 1827.
2D DIVISION.
Ld. Mackenzie.
F.

THE late John Austin, father of the suspenders, was proprietor of a small heritable property, over which he had granted an heritable bond for £260. He died in 1822, leaving a disposition of all his property in favour of his wife and children; and his

widow thereafter granted a second heritable bond over the property for £100. Both these bonds having been acquired by Grant and Anderson for behoof of Austin's creditors, they proceeded, by direction of the creditors, to take steps for selling the property under the powers in the late Mr. Austin's bond. A bill of suspension was then presented in name of the tutors appointed by Austin to his children, which, after their removal as suspect, (mentioned ante, Vol. V. No. 110,) was carried on in name of the minors with a curator ad litem; and an offer was made to Grant and Anderson to pay them the contents of the bond for £260, on their executing an assignation in favour of a third party, who was to advance the money. This offer having been refused by Grant and Anderson, who contended that they were only bound to grant a discharge, the Lord Ordinary found, 'that, in 'the circumstances of this case, the chargers ought not to be al-'lowed to sell the property in question for payment of the debt, 'while they refuse to receive payment thereof on granting the 'assignation asked by the suspenders.'

Against this interlocutor the chargers reclaimed, and contended that they were not bound to do more than discharge the bond to their debtor, especially when their so doing would be in prejudice of their other bond for £100 granted by the widow of Mr. Austin.

To this it was answered, That the children of the deceased John Austin were not properly debtors in the bond, having taken up their father's succession cum beneficio inventarii; and, at any rate, that the children of a party deceased, if they could not advance the money themselves, were entitled to demand an assignation in favour of a friend willing to advance it, in order to preserve their patrimony from sale; and as to the prejudice to be sustained by the chargers, that their bond from the widow was inept, as she could not burden the heritable property.

The Court unanimously adhered to the Lord Ordinary's interlocutor.

Lord Glenlee.—This is not a question whether a creditor, if he were making no attempt to sell, could be compelled to grant an assignation on payment. This is to prevent a sale; and the fundamental question is, whether matters are in such a state as that advantage should be allowed to be taken of the forfeiture in the bond? In general, I do not think creditors should be obliged to assign in prejudice of their other claims; but the question here is, not whether the creditors are bound to accept payment of the debt, and give an assignation, but whether, if they refuse the offer, the sale should be allowed to proceed? In the circumstances of the case, I think that it ought not.

The other Judges concurred.

Chargers' Authorities.—3. Ersk. 5. 11; Home, July 10. 1666, (3347); Watt and Rae, Dec. 31. 1697, (3356); Kennedy, Feb. 24. 1708, (3370); Hay, Feb. 14. 1702, (3356); Bruce, Feb. 11. 1676, (3365); Milne, Nov. 6. 1678, (3367); Mann, Dec. 19. 1765, (3370); Preston, Feb. 22. 1715, (3376.)

J. Patison Jun. W. S.—C. Fisher,—Agents.

D. Sutherland, Pursuer.—*Brown.*
H. Paul and Others, Defenders.—*Fletcher.*

No. 325.

Cessio.—A party who had illegally appropriated to himself funds belonging to his employer, and spent them, refused the benefit of the cessio, although he had suffered 18 months imprisonment.

Sutherland, having applied for the benefit of the cessio, was opposed by Paul, who stated that, after he had been a few months in his service as a confidential clerk, he had appropriated upwards of £400 to his own purposes, and that he had spent the greater part of it in purchasing articles of dress, trinkets, &c. for a girl of the name of Sally Wilson, who kept a house of bad fame both in Glasgow and Edinburgh. Sutherland did not deny the fact, but rested his claim chiefly on having endured eighteen months imprisonment.

May 25. 1827.

1st Division.
H.

The Court refused the cessio in hoc statu.

Lord President.—In such a case we cannot listen to the plea of favour from the length of imprisonment. The pursuer will be much the better of eighteen months more.

J. Nairn,—J. A. Campbell, W. S.—Agents.

W. Brown, Pursuer.—*Skene—Buchanan.*
Wemyss and Walker, W. S. Defenders.—*Cockburn—Rutherfurd.*

No. 326.

Process—Bill-Chamber Clerk.—A party having raised an action against his law agent, on the ground of being responsible for an insufficient cautioner being received in the Bill-Chamber—Held, that as the Bill-Chamber Clerk had an interest in the question, he must be called as a defender.

Brown, being creditor of George Patterson and William Fergus for £40, contained in their accepted bill, gave them a charge; and they having presented a bill of suspension, he employed the defenders, Messrs. Wemyss and Walker, W. S. to act as his agents. The bill of suspension having been sisted, and ordered to be answered, the defenders entered appearance for Brown in the Bill-Chamber. A bond of caution, subscribed by Robert M'Alpine,

May 25. 1827.

1st Division.
Lord Meadowbank.
S.

merchant in Leith, was then lodged with the clerk by the suspenders; and no answers having been given in, the bill was passed. After a great deal of litigation, the letters were found orderly proceeded; and the suspenders having become bankrupt, Brown proceeded to enforce the bond against the cautioner, but he was ascertained to be also bankrupt. Brown, then, alleging that the cautioner was notoriously insolvent at the time the bond was received,—that it was the duty of the defenders to have seen that the cautioner was solvent,—and that they had neglected to do so, brought an action against them, concluding for payment of the debt.

In defence, they pleaded that it was the duty of the Clerk of the Bills to receive cautioners; that the agent had nothing to do with that matter; and that if any liability attached to any party, it was to the Clerk of the Bills, and not to the defenders; and therefore the Clerk ought at least to have been called as a party.

The Lord Ordinary, 'in respect the Bill-Chamber Clerk is not 'called as a party, dismissed the action,' reserving to Brown to bring a new action against the present defenders, and any other party he may think proper.

Brown having reclaimed, the Court recalled the interlocutor, and, upon payment of the previous expenses, allowed the Clerk of the Bills to be called as a party, and sisted process till he should be called.

Lord President.—I always understood that the Bill-Chamber Clerk was liable for the cautioner received by him. I believe that, in practice, he requires the agent for the charger to say whether he has any objection to him; but I apprehend the agent is entitled to tell the Clerk to act on his own responsibility. It is plain, however, that the interest of the Clerk is involved in this process, and therefore that he ought to be a party to it.

Lord Balgray.—This is a case of importance, involving the question, first, what is the duty of an agent in a suspension,—and, second, what is the duty and responsibility of the Clerk of the Bills. The plea of the pursuer is against all the established principles in regard to the duty of the Clerk. He says that that officer has nothing to do as to inquiring into the solvency of the cautioners offered to him. But I say that it is his duty to ascertain that fact; and for doing so he is paid, and well paid. Perhaps he may inquire of the charger or his agent, whether he has any objections to the proposed cautioner, and this may be very prudent on his part; but I agree with your Lordship, that neither the charger nor his agent is bound to interfere in the matter. The Clerk of the Bills is a public officer, of which this is part of his duty; and the charger or his agent is entitled to tell him that it is his province, and not theirs, to be satisfied

as to the cautioner. If so, then the liability must attach to him alone, and consequently the present defenders should be assoilzied in toto.

LORD CRAIGIE.—This is certainly a very important question, and one involving the liability of not only the Clerk of the Bills, but of the Clerks of the Commissary Court, Inferior Courts, and the Court of Session. By the Act of Sederunt 18th February 1686, the duty of receiving cautioners is imposed on the Clerk of the Bills; and I well recollect that when Sir Ilay Campbell remarked that there was great hardship in making the Clerk responsible for the cautioner, the other Judges answered, that he might ascertain whether the party was satisfied with him; but it was not doubted that the duty lay upon the Clerk, and not upon the agent. I think, however, that instead of dismissing the process, the Clerk may be called as a party, so that he may be heard for his interest.

LORD GILLIES.—If it be quite clear that the liability attaches to the Clerk alone, then the defenders should be assoilzied. The Act of Sederunt 18th February 1686 is quite distinct as to the liability of the Clerk, and there is nothing said as to his waiting till the cautioner be objected to. No doubt, that act is repealed by the subsequent one of 14th June 1799; but it declares, 'that in time coming 'the Clerks of the Bills shall be responsible for the due and faithful 'execution of their duty in receiving or rejecting cautioners, ac-'cording to the rules of common law and justice, applicable to the 'circumstances of the cases that may hereafter occur;' so that the Clerk has manifestly an interest in this question, and consequently ought to be called as a party.

J. GREIG, W. S.—D. FISHER, S. S. C.—Agents.

CRAWFORD'S TRUSTEES, Pursuers.—*Fullerton—Graham Bell.* W. HAIG and Others, Defenders.—*D. of F. Moncreiff—Ivory—Gibson-Craig.*

No. 327.

Sexennial Prescription—Bankrupt Statute—Sequestration.—1.—Held, that the production of a bill in the hands of the preses of a meeting of creditors for the election of a trustee on the sequestrated estate of one of several co-acceptors, is not such a production under § 52 of the Bankrupt Statute, as is equivalent to an action, and sufficient to save the bill from prescription as against the other acceptors;—and, Observed unanimously,—2.—That the effect of a production in terms of the statute in a subsisting sequestration would not be done away by a subsequent recall, as improperly awarded.

May 25. 1827.
2D DIVISION.
Ld. Cringletie.
F.

THE late Robert Meldrum, agent for the Bank of Scotland at St. Andrews, as principal, and Messrs. Haig, Clark, Fairnie, and Captain Meldrum, as cautioners, accepted a bill for £390, drawn by one Bell, and dated 1st September 1815. In March 1819 a sequestration was awarded of the estate of Meldrum, the

principal acceptor, and a meeting of his creditors was held on the 5th April for choosing an interim factor. Two parties having claimed the office as duly elected, an application was presented by the creditors, praying the Lord Ordinary to devolve the interim management on the sheriff-clerk of the county; and a warrant to this effect was granted, and extracted on the 27th of April. The election of a trustee was appointed to take place on the 3d of May thereafter, and accordingly a meeting of creditors was held, at which the sheriff-clerk was not present; but Mr. Monypenny appeared on his behalf, and produced a book in which the warrant of the Court had been engrossed by him, and also a letter from him, stating that the time betwixt his appointment and the day of meeting had been so short, 'that it afforded no opportunity to 'him to take any measures in regard to the bankrupt estate, all 'the papers and documents with respect to which being in Edin-'burgh.' Among the claims tendered at this meeting was one by William Crawford, to whom the bill above mentioned had been indorsed, and who produced the bill, with an affidavit. The bill was accordingly marked by the preses, (who happened to be Mr. Haig, one of the acceptors,) and returned to Crawford, who, in virtue of it, voted for the election of a trustee. There were two candidates for this office; but the apparent majority of votes being in favour of the late Mr. John Crawford, he immediately presented a petition for confirmation, and was confirmed accordingly. A counter petition was shortly afterwards presented by the other candidate, on which the Court recalled the interlocutor confirming Crawford, and remitted both petitions to the sheriff of the county, to be reported on in common form. No report, however, was ever returned in this competition,—there having been, in the mean time, an application presented by certain of Meldrum's creditors to have the sequestration recalled, on the ground that he did not fall within the description of persons to whom sequestration was permitted by the Bankrupt Statute; on which application, after considerable discussion, the Court, in 1821, recalled the sequestration. (See ante, Vol. I. No. 163.) An appeal was entered against the judgment of the Court; but, at a meeting of creditors, it was directed to be withdrawn. A private trust was then agreed to, under which the above-mentioned bill was lodged, and a dividend was paid on it out of Meldrum's estate; but, during all the preceding period, no further steps had been taken to preserve it from prescription.

In 1822, however, an action for payment, directed against the trustees under Meldrum's trust-deed, and the several co-acceptors,

was raised by William Crawford,—afterwards transferred by him, along with the bill, to the late John Crawford, and, since his death, carried on by his trustees. The defence pleaded by the cautioners was prescription; in answer to which it was maintained by the pursuers,

1. That the production of the bill at the meeting of Meldrum's creditors for election of a trustee was a production falling within the terms of the Bankrupt Statute, which declares, 'that the 'making production of the ground of debt or certified account, 'with the oath of verity aforesaid, in the hands of the interim 'factor, sheriff-clerk, or trustee, or in the Court of Session, shall 'have the same effect as to interrupting prescription of any kind 'from the period of such production, as if a proper action had 'been raised on the said grounds of debt against the bankrupt, 'and against the trustee;' and consequently, as an action against Meldrum would undoubtedly have kept up the bill against all the other obligants, this production must necessarily have the same effect; and that no other production could well have been made, as there never was an interim factor or trustee with whom to lodge the bill, and as the sheriff-clerk had not acted.

2. That although the sequestration was subsequently recalled, yet it is declared by the statute, in reference to the case of an application for recall, 'that in the mean time, until this matter be 'finally determined, the proceedings under the sequestration shall 'go on as if no application had been made;' and that therefore there was a non valentia on the part of the holder of the bill to take any other step for its preservation than that which he did, as he could not have proceeded with diligence or by action pending the sequestration.

3. That, subsequently to the lapse of the six years, Clark, one of the cautioners, had written letters equivalent to an acknowledgment of the debt, which, it was contended, revived the bill as to the whole co-obligants; and,

4. That the marking on the bill by Haig, another of the cautioners, as preses of the meeting at which it was produced, was an acknowledgment of the debt on his part.

To this it was answered,

1. That the production of a document at the meeting of creditors for election of a trustee, at which the statute did not require the presence of either the interim factor or the sheriff-clerk, was not a production, in terms of the statute, 'in the hands of the 'interim factor, sheriff-clerk, or trustee, or in the Court of Ses-'sion,' and that the sheriff-clerk had in truth acted, or at all

events had never refused to act; but besides, that it was always competent to have produced the bill in the Court of Session, by lodging it with the clerk of process.

2. That Meldrum having been ultimately found not to fall within the description of persons whose estates the Court are warranted to sequestrate, the sequestration, and whole proceedings had thereon, must be held to be null and void, as ultra vires of the Court; but that, were it otherwise, the sequestration of Meldrum could create no non valentia in respect to the other obligants, against whom diligence or action might have proceeded; or even as to Meldrum's estate, since the statute had substituted for diligence or action four modes of preserving the bill, viz. lodging it in the hands of the interim factor, sheriff-clerk, or trustee, or producing it in the Court of Session.

3. That the letters founded on were not equivalent to an acknowledgment, so as to affect even Mr. Clark himself; but, at all events, as to the other obligants, that it was now settled that an acknowledgment by one party to a bill, after the six years, could not affect the other obligants; and,

4. That Mr. Haig's marking the bill, as preses of a meeting of creditors, could infer no personal acknowledgment of his liability for the debt; and, at all events, that it was prior to the lapse of the six years.

The Lord Ordinary having reported the cause, in which appearance had been made for three of the cautioners, Haig, Clark, and Fairnie, (decree in absence having passed against the other, Captain Meldrum,) the Court, on advising the informations ordered by his Lordship, appointed a condescendence by the pursuers as to the manner of the alleged production of the bill in the sequestration. Before the case came to be finally decided, however, Clark became bankrupt, and his trustee having refused to sist himself, the Court decerned against him; but, in regard to the other two cautioners, Messrs. Haig and Fairnie, they sustained the plea of prescription, and assoilzied.

When the cause was first before the Court, their Lordships gave their opinions as to the effect of the recall of the sequestration as follows:—

Lord Glenlee.—I cannot say that the point as to the recall of the sequestration is at all clear. If the ground on which the production in the sequestration was to be held as stopping prescription, depended entirely on the circumstance of the creditor taking a step to keep up his right, then the sequestration in this case would be merely in the situation of an irregular action. But there is another principle, viz. that the sequestration introduces a non valentia agere cum effectu,

so that to bring an action against the party under sequestration would be absurd. The sequestration, while subsisting, had the full effect of a regular one, and introduced as complete a non valentia as if it had never been recalled; and I therefore cannot hold the recall as bringing things to the same state as if there never had been a sequestration.

LORD JUSTICE-CLERK.—I view this matter in the same light. Whenever a sequestration is awarded, all proceedings must immediately go on as if it were correct. The question of recall is a matter of discussion, and here two years were consumed in it; but the proceedings may go on all the time. Suppose that every thing had been done, in regard to the production, which the act requires, I must confess that I could not come to the conclusion, that, in consequence of a subsequent recall, every thing which had been done must go for nothing, as utterly null and void, and that the interests of bonâ fide creditors are to be thereby defeated.

LORD PITMILLY concurred.

LORD ALLOWAY.—As to the question, whether the recall could deprive any parties who had exercised rights under the sequestration from the benefit of it, I think that neither third parties, nor those under the sequestration, can be so deprived of the benefit of it. The production of a bill in any competition, as a ranking and sale, is held in law to be an interruption; so that the existence of the sequestration, and the production of the bill under it, would have interrupted prescription at common law. But, besides, sequestration operates as a diligence for behoof of all the creditors, and prohibits all other diligence; so that the creditors are precluded from the exercise of those rights whereby they might have interrupted prescription; and I therefore conceive that it is impossible to hold that the recall of the sequestration could deprive the party here of any defence against prescription, which he may have under the act of Parliament by the production of the bill.

After the condescendence was lodged, their Lordships, on finally advising the cause, delivered the following opinions on the question whether the production was in terms of the statute:—

LORD JUSTICE-CLERK.—I do not think the condescendence places the matter of fact in a different view. There was no lodging with the interim factor, the sheriff-clerk, the trustee, or in the Court of Session; and I cannot hold the producing the bill at the meeting to be within the act. We have no power to introduce equipollents, but must hold to the strict provisions of the statute, which has not been complied with here; and there has been, therefore, no such production as to prevent the running of prescription.

LORD PITMILLY.—I entirely concur with your Lordship. The act 1772 lays down the general rule of prescription on the lapse of six

years, and the Bankrupt Statute establishes an exception, if a particular mode be complied with; but we must confine ourselves to that mode. I cannot here see the difficulty of having lodged the bill with the sheriff-clerk. He did not refuse to act. It may be true he did not do any thing; but was there any thing to prevent lodging the bill with him? Or it might have been lodged in the hands of the clerk of the process, which would have been a production in the Court of Session. Neither of these was done; but it was produced in the hands of the preses of the meeting, which is not within the statute.

Lord Alloway.—I cannot consider the question in the narrow point of view taken by the Judges who have preceded me. It is true that by the act of 1772 sexennial prescription was introduced, but under the exception of an action having been raised or diligence done. Now, if in a multiplepoinding the bill be produced, this would bar prescription, although it would not fall within the strict terms of the act 1772. Even in the long prescription, it is held that a non valentia agere is a sufficient ground for eliding prescription. Now, how can we lay aside here what affects every other prescription? There was a non valentia agere here, as the creditor was prohibited from raising diligence by the sequestration, which is declared to be a general diligence for behoof of all the creditors, and therefore a ground sufficient to bar prescription. But even if the question is to be confined to the words of the Bankrupt Act, there was, I conceive, a sufficient production here. The whole proceedings in a sequestration are under the superintendance of this Court, which appoints the meeting to choose the trustee. Now, when such a meeting takes place under the authority of this Court, is not a production in it a production in the Court of Session? The extract of the sheriff-clerk's powers did not take place till the 27th of April, and the election meeting was on the 3d of May thereafter. At this meeting the party appears, and, as the sheriff-clerk could not attend, the preses is chosen, and the bill is produced and marked by him, and a vote on it is reckoned. It comes before the Court, and their sanction is given to it by confirmation. It is afterwards remitted, no doubt, on a competition, and the application for recall of sequestration is made on the 19th of May, and not decided for two years in June 1821, when the sequestration was recalled. During all this procedure, the party was prohibited from using diligence—there was a non valentia agere. It may be said he was entitled to raise an action; but what would be the use of this against a person under sequestration? And, upon the whole, I cannot doubt but that this was a sufficient production to bar prescription.

Lord Glenlee.—At first the matter appeared to me in the light in which Lord Alloway has viewed it. But what brought me to be of the same opinion with your Lordship and Lord Pitmilly was this:—The question is not as to whether the bill is kept up against Mel-

drum, the bankrupt, but whether it has been kept up against the other obligants. As against Meldrum, I should think that enough has been done to keep it up, not in respect of the clause in the act, but at common law, because there was a non valentia agere against him cum effectu. But it is very different where the question comes to be whether the bill has been preserved against the others. A claim against one individual, other than an action, I understand not to keep up the debt against any of the obligants except that individual. For, if it were enough to keep one person bound, we have here Meldrum's trustee confessedly so, and actually paying a dividend on it. But when we come to talk of any obligant other than him against whom steps have been taken (not being an action,) we cannot hold it as kept up. On the general point, therefore, I think the bill has not been kept up against the cautioner, as it is in vain to say there was a non valentia agere as to them, for the statute points out many things which might have been done to save prescription; and my view as to the bill being preserved against the bankrupt does not depend on the clause of the statute, but on the rule of common law, that a non valentia agere (produced in his case, and quoad him by the sequestration) prevents the running of prescription; but to make the production effectual against other parties, it must be brought within the terms of the statute, which I do not think it is.

J. ROBERTSON, W. S.—TENNANT and LYON, W. S.—GIBSON-CRAIGS and WARDLAW, W. S.—Agents.

A. M. GUTHRIE and Others, Suspenders.—*Gordon.*
G. MILLER, Charger.—*Jameson.*

No. 328.

Jurisdiction—Police.—The Court will not interfere with the exercise of the discretionary powers vested in Commissioners of Police under a local police act, except in case of excess of power, or deviation from the statute.

May 25. 1827.

2D DIVISION.
Ld. Mackenzie.
M'K.

BY a local act (5. Geo. IV. c. 129.) for paving, lighting, watching, and cleaning the burgh of Dundee, power is given to the Commissioners of Police thereby appointed, either ex officio, or to be elected by the several wards, to make orders and regulations for these purposes, and generally to execute the whole matters specified in the act; and they are specially empowered to levy assessments on the several dwelling-houses, &c. not exceeding a specified rate,—it being declared that all parties who may conceive themselves aggrieved by the amount of assessment proposed to be laid on them, may appeal to a meeting of Commissioners to be held for considering such appeals, and the Commissioners, it is provided, 'shall finally fix the amount.' This act includes within its operation, besides the burgh proper, the suburbs, and

certain grounds adjacent, specially mentioned; but it is provided by section 3, 'That, in order that those wards, if there be any 'such within the said bounds, which the General Commissioners 'under this act may not find it expedient to pave, or to watch, or 'to light, may not be assessed under this act for those purposes, 'it shall be lawful for the said General Commissioners, and they 'are hereby authorized and empowered to exempt for a time, or 'during the continuance of this act, any place or places, grounds 'and houses, within the limits before described, from all or any 'of the regulations herein after established in regard to paving, or 'lighting, or watching; declaring always, that any such grounds, 'houses, place, or places, if so exempted from all of the said re-'gulations, shall, during the continuance of such exemption, be 'free from payment of the corresponding assessment by this act 'authorized to be levied.'

Under authority of this act, the Commissioners of Police proceeded to light and watch the town; but although they levied the highest rate allowed by the statute, their funds were insufficient to light or watch adequately the outskirts, and, in particular, the houses or villas of Guthrie and the other suspenders. From these the nearest lamps and watchmen's beats were several hundred yards distant; in one case the nearest lamp on the one hand being 564 yards distant, and on the other hand 950 yards; and the nearest watchman's beat 514 yards on the one side, and 1655 on the other.

In these circumstances, the proprietors brought a suspension of a charge for payment of the assessment at the instance of Miller, the clerk of the Commissioners, on the ground, that as they did not receive the benefit contemplated by the act, they could not be subjected in the assessment; and, in particular, that they were entitled to exemption under the third section of the statute.

To this it was answered,

1. That in regard to matters of police under a special statute, in which the ordinary Courts of Law had no original cognizance, if the Commissioners, or other persons to whom the execution of the act is intrusted, be empowered 'finally' to fix the amount of assessment, the Court of Session cannot interfere, unless in the case of excess of power; and that, in the present instance, there had been no excess of power, the Commissioners having merely exercised the discretion confided to them by the statute in the distribution of lamps and watchmen, and having indeed exercised it judiciously, and as beneficially for all parties as their funds permitted; and,

2. That the third section only allowed an exemption of whole

wards, not of individual houses or districts; and, besides, that the power of exemption was discretionary in the Commissioners.

The Lord Ordinary having reported the cause on Cases, the Court found 'that by the third section of the act of Parliament 'founded on, the General Commissioners of Police are not pre-'cluded from exempting from assessment any house or houses, 'place or places, to which the benefit of the act may not be ex-'tended, and reserved to the suspenders to apply again to the 'General Commissioners for such exemption;' and under the above finding they repelled the reasons of suspension, and found the letters orderly proceeded.

LORD JUSTICE-CLERK.—It did not appear to me that there was any clause in this act to exclude the review of this Court in a case of flagrant excess of power, or deviation from the statute. But the question here is, whether, on the facts stated, there is such a flagrant deviation as to justify the interference of this Court? It would be absurd for this Court to sit here and decide all the questions which fall under the ordinary duty of Commissioners of Police. The Commissioners, however, are entirely wrong in their construction of § 3, as to exemption. It is quite a mistake to suppose that they must leave out whole wards if they exempt at all. It relates to particular portions of the wards, and in a fair exercise of their powers they are bound to give redress to portions which they do not light and watch. We must look to this, however, that the funds are miserably deficient, and it is impossible to expect them to light and watch the outskirts in the same manner as the centre of the town. If the Court saw a case of wilful denial of rights under the statute, or a clear excess of power, we would interfere; but we cannot be called on to fix whether there is to be a lamp at this point, and a watchman at that.

LORD GLENLEE.—I see no allegations that this ward is not lighted as far as the funds will admit, or that the lamps might be placed so as to light the whole ward better, or that the present number of lamps might be kept up with the funds, if these gentlemen were exempted.

LORD PITMILLY.—On some points there can be no difference. As to the jurisdiction of this Court, it is clearly as your Lordship has stated. It is also clear that the construction put by your Lordship on § 3 is correct, and I have no doubt, therefore, of the power of exemption. But on the facts I have considerable difficulty. Mr. Guthrie is one third of a mile from a lamp, and yet is he to be assessed? It appears to me very hard, and I rather thought that it was within the power of the Court to relieve him.

LORD ALLOWAY.—The doctrine laid down from the Chair as to jurisdiction cannot be disputed. The great distinction is, that when this

Court has no previous jurisdiction, it requires express terms to exclude. But when there is no previous and radical jurisdiction, and the jurisdiction is created by the statute, the question comes to be determined on this ground, Have the parties intrusted with powers exceeded them? For while they keep within the bounds of the statute, which commits to them a discretionary power, unless excess of that power is pointed out, this Court cannot well interfere. There must be a local power for exercising this discretion, and it could not be more fairly vested than it is here, and in so far as they merely exercise that discretion, I would not interfere. The question of cui commodum cannot apply. Take the case of roads,—a man who travels ten miles pays no more toll than he who goes only 100 yards, and I apply this to the objections of Lord Pitmilly. There can be no doubt of the Commissioners' power to exempt under § 8; and on the whole I agree with the Lord Justice-Clerk.

A. STORIE, W. S.—J. BROWN, W. S.—Agents.

No. 329.

D. KNOX, Suspender.—*Forsyth.*
D. BRAND and W. BERRY, Chargers.—*D. of F. Moncreiff.*

Possessory Judgment.—Circumstances under which a personal title, with seven years possession, was held sufficient to warrant a possessory judgment.

May 26. 1827.
1st DIVISION. Bill-Chamber. Lord Craigie. S.

THIS was a question as to a possessory judgment of a right of ferry, in support of which the chargers founded upon a Crown charter dated in February 1819, a sasine in March thereafter, with possession thereon for the requisite period. On the other hand, Knox alleged, that although seven years had expired from the date of the charter, yet several days were wanting to complete that period from the date of the sasine.

The Lord Ordinary refused the bill; and the Court adhered.

LORD BALGRAY.—The charter itself is a sufficient title of possession; and we all know, that in order to have a possessory right to a servitude, any written title is sufficient.

The other Judges concurred.

J. YULE, W. S.—A. FORSYTH, S. S. C.—Agents.

No. 330.

T. SCOTT, Suspender.—*Forsyth.*
A. ALEXANDER, Charger.—*Donald.*

May 27. 1827.
1st DIVISION. Bill-Chamber. Lord Craigie. H.

THIS was a suspension of a decree proceeding upon an oath, which the Lord Ordinary refused; and the Court adhered.

D. FISHER, S. S. C. Agent.

A. CALDWELL and Others, Suspenders.—*Sol.-Gen. Hope.*
P. CAMPBELL, Charger.—*Shaw.*

No. 331.

Decree in Foro—Agent and Client—A. S. Feb. 6. 1806.—A party having been charged on a decree of the Court of Session bearing to be in foro, and to have proceeded on a petition by an agent against his client under the above A. S., and that it had been duly served—Held competent to pass a bill of suspension on caution for the expenses of the decree merely, on the allegation that it had been served only on the opposite agent, and not on the party.

May 26. 1827.

1ST DIVISION.
Bill-Chamber.
Lord Craigie.
H.

CAMPBELL, as agent in a process of sequestration, in which Caldwell and others claimed as creditors, having applied to have his accounts taxed in terms of the Act of Sederunt 1806, a remit was made to the Auditor, and a decree was pronounced against Caldwell and others, and thereafter an extract was issued, which was marked as a decree in foro, and stated expressly that the petition had been duly served.

Against a charge on that decree Caldwell and others presented a bill of suspension, without caution, alleging that the petition had not been served upon them, and that it had merely been intimated to an agent who happened at that time to be employed by them.

To this it was answered,

1. That as the decree bore that the petition had been duly served, and was in foro, it was not competent to suspend it upon any alleged irregularity not appearing ex facie of it; and,

2. That even if the allegation were correct, it was not relevant to set the decree aside, because the Act of Sederunt merely required that intimation should be made to the 'opposite party,' which in practice had been construed to be the opposite agent; and that in this case the suspenders had been parties to the process of sequestration which was then in dependence.

The Lord Ordinary refused the bill; but the Court passed it, on caution for the expenses of obtaining the decree.

N. W. ROBERTSON, S. S. C.—CAMPBELL and BURNSIDE, W. S.—Agents.

D. JOBSON, Suspender.—*Moir.*
A. REID, Charger.—*Pyper.*

No. 332.

Parent and Child.—Bill of suspension passed simpliciter to try the question, whether, in the circumstances, the presumption of pater est quem nuptiæ demonstrant was redargued.

May 26. 1827.

1ST DIVISION.
Bill-Chamber.
Ld. Corehouse.

THIS was a charge of a decree of the Inferior Court, finding that the suspender was the father of the child of a married woman, under circumstances which, it was alleged, excluded the presumption that pater est quem nuptiæ demonstrant.

The Lord Ordinary refused the bill; but the Court, without hearing counsel on either side, considering the question of very great importance, altered, and passed the bill simpliciter.

G. Scott, S. S. C.—J. D. Lawrie, S. S. C.—Agents.

No. 333. H. Hamilton, Advocator and Suspender.—*D. of F. Moncreiff —Brown.*

Mrs. J. Wyllie and Son, Respondents and Chargers.—*Neaves.*

Marriage.—1.—Circumstances sufficient to constitute an irregular marriage.—2.—Held irrelevant as a defence against a declarator of marriage, adherence, and aliment, to allege that the woman had, previously to her marriage with the defender, had carnal connexion with his full brother, and had concealed that circumstance from the defender.

May 26. 1827.

2d Division. Bill-Chamber. Consistorial. B.

The advocator, Hamilton, who was the second son of a respectable landed proprietor, entered into an illicit connexion with the respondent, then a servant in his mother's family, in consequence of which she became pregnant; and in January 1821 she left her service, and went to reside with her uncle, a farmer, to whom Hamilton had applied to receive her into his house, which was situated within a few miles of Glasgow. In the course of the February following, the respondent, accompanied by her uncle and his daughter, went to Glasgow, where they met Hamilton at an inn, from whence they proceeded to the office of the Procurator-Fiscal of the burgh to obtain a form to be gone through, practised in that and some other of the burghs of Scotland, of celebrating irregular marriages, by presenting a petition to the Magistrates, stating that the parties had been irregularly married, and praying for fine or imprisonment, on which the parties emit a declaration confessing the charge, and are sentenced to pay a certain fine; and they then obtain an extract of the sentence, which serves as a proof of the marriage. In the Burgh Court of Glasgow printed copies of such petitions, declarations, and extracts, are kept blank in the names of the parties; and on the present occasion one of these petitions was presented, setting forth that the advocator and respondent 'had obtained themselves married without proclamation of banns, and not agreeably to the 'regulations of the church,'—and praying that they might be fined or imprisoned, as directed by law. The parties then, in presence of one of the Magistrates, did, as the extract of the sentence bore, 'severally acknowledge themselves to be man and 'wife; and that upon the day of , that is, lately, they 'obtained themselves married without proclamation of banns,'

&c. They likewise subscribed a declaration to this effect; and a printed sentence was accordingly signed by the Judge, fining the advocator 'in one hundred merks Scots for his irregular mar-'riage complained of, reserving to consider how far he ought to 'be imprisoned.' After this judicial procedure the parties went back to their inn, where they had a dinner, at which their healths were drank as Mr. and Mrs. Hamilton;—they then returned to the house of the respondent's uncle, and went to bed together. Shortly afterwards they set out on a marriage-jaunt, in the course of which they conducted themselves and were treated as man and wife. The respondent was subsequently delivered of a son; but Hamilton having deserted her, she, for some time, accepted aliment for the child as a natural child, and on one occasion signed a receipt for a certain sum, 'being in part of a sum agreed to be 'received by me for the aliment of a natural child, in terms of 'my agreement;' but afterwards, in the year 1824, she raised before the Commissary Court, in her own name and that of her child, an action of declarator of marriage, and legitimacy, adherence, and aliment, in which the facts above stated were proved by the extract of the sentence and original proceedings in the Burgh Court of Glasgow, and by the evidence of the Magistrate, Procurator-Fiscal, and other persons present, and likewise of different individuals who had seen the parties subsequently and during their jaunt together. In defence, Hamilton craved to prove a circumstance which he stated to have come to his knowledge after the alleged marriage—viz. that the respondent had previously had carnal connexion with his full brother. The Commissaries refused to allow proof of this averment, and decerned in terms of the respondent's libel; and thereafter they modified the aliment to be paid her to £60 yearly, and £20 yearly for the child,—having previously found Hamilton liable in £150 of interim aliment. Of the final judgment in the cause Hamilton presented a bill of advocation; and having been incarcerated on the decree for interim aliment, he likewise presented a bill of suspension and liberation, and in support of these bills he argued,

1. That the evidence of the persons present at the proceedings before the Magistrates of Glasgow, as to what there took place, was not competent proof of judicial acts;—that these disgraceful proceedings, by which the Burgh Court of Glasgow lends itself to encourage an evasion of law, ought not to be looked to as evidence in this Court, and are not sufficient to constitute a marriage, or to prove that interchange of consent de presenti necessary to do so,—proceeding, as they do, on the assumption of

what is admitted by both parties to be a falsehood, viz. that a marriage had been previously celebrated, though irregularly; and further, that the other circumstances brought out in evidence were not sufficient to constitute marriage.

2. That he ought to have been allowed a proof of his averment regarding his brother's previous connexion with the respondent, in regard to which he maintained, That as, by several judgments of our Courts, persons guilty of carnal intercourse with parties who had previous illicit connexion with their brothers or sisters had been capitally punished; and as such intercourse was so naturally abhorrent to the feelings of mankind, the concealment of such a circumstance amounted to that degree of fraud which entitled the party so imposed on to be freed from the contract.

3. That, at all events, he could not be ordained to adhere under the circumstances which he offered to prove, as he would thereby be guilty of a crime which had frequently been capitally punished; and consequently, as aliment could only be awarded on failure to adhere, that he ought not to be subjected in this burden; and,

4. That the aliment awarded was exorbitant in his circumstances.

For the respondent, on the other hand, it was answered,

1. That the witnesses adduced of what passed in presence of the Magistrate was merely corroborative of the proceedings which then took place, and which were sufficiently established by the extract; and that the acknowledgment then made was alone sufficient to constitute marriage, which was further completely established by the subsequent conduct of the parties.

2. and 3. That the notions formerly acted on in this country, of a sort of affinity being created by mere carnal intercourse, must now be totally disregarded; and that an error, such as that which the advocator's averment would go to establish, was not of so material a nature as to vitiate the contract of marriage; and as to the obligation to adhere, or, on failure, to aliment, that it necessarily followed from the establishment of the marriage; and,

4. That the advocator's circumstances and situation warranted the amount of aliment awarded.

The Court unanimously refused the bill of advocation as to the merits, but remitted to investigate further in regard to the amount of aliment; and they likewise refused the bill of suspension and liberation.

Lord Glenlee.—I thought the judgment of the Commissaries right. Nobody can approve of the proceedings before the Magistrates of Glasgow. Still it has been the practice to sustain such a proceeding

as proof of marriage. There is no allegation, as in the case of Brown, (ante, Vol. II. No. 485,) that the parties were drunk; and it is impossible to hold that they did not acknowledge themselves husband and wife. The Commissaries were quite right in refusing to allow any proof of connexion with the brother.

Lords Alloway and Pitmilly were of the same opinion.

Lord Justice-Clerk.—I also entirely concur. I cannot, however, avoid expressing my surprise that the Magistrates of Glasgow have not attended to the observations made by the Court in the case of Brown in regard to these proceedings; and I trust that the Lord Advocate will take some steps on the remit then made to him. Still, however improper, the parties do acknowledge themselves to be married persons, and the extract, &c. are sufficient evidence of it. All doubt, too, is removed by the parties going to the uncle's house as man and wife, and taking a marriage-jaunt as such. I am likewise clearly of opinion that the Commissaries were right in refusing a proof of connexion with the brother, which has no relevancy.

Advocator's Authorities.—(1.)—Broughton, Dec. 9. 1542, (12264); Lauder, Jan. 9. 1628, (Sup. 1. 58. and 262); Spottiswoode, Mar. 247; Brown, Nov. 12. 1680, (12267); Tait on Evidence, 342-6.—(3.)—Duet. 7. c. 22. v. 20; Voet. 24. 2. 15; Christen. de Causis Matrim. 581; Stair, p. 26; 1. Bank. 115; 1. Hume on Crimes, 446.

W. and A. G. Ellis, W. S.—Hunter, Campbell, and Cathcart, W. S.—Agents.

Blackie, Fullarton, and Company, Suspenders.—*D. of F. Moncreiff—Thomson.*

J. Aikman and T. Ireland, Respondents.—*Jeffrey—H. J. Robertson—Pyper.*

No. 334.

Literary Property.—A bookseller having agreed with an author for an edition of a history to be written by the latter in four volumes, and having obtained subscriptions for all that could fall within his edition, held not entitled to prevent the author from publishing a continuation of the history, which embraced part of the period, and also some of the matter contained in the last of the four volumes.

May 26. 1827.

2d Division. Bill-Chamber. Lord Medwyn. F.

In the year 1820 Khull, Blackie, and Company, booksellers in Glasgow, (in whose right the suspenders, Blackie, Fullarton, and Company, now stand,) entered into a verbal agreement with the respondent Aikman, whereby the latter, for a remuneration of two guineas and a half per sheet, bound himself to write a new translation of Buchanan's History of Scotland, with a continuation to the Union, including, as the title-page bore, 'a concise 'history of the sufferings of the church of Scotland from the Re-

'formation to the Revolution.' This work was to extend to four volumes, in twenty separate parts, and the booksellers were to be entitled to an edition of it, the extent of which, however, was disputed. The book was accordingly published in parts, which were extended to twenty-one instead of twenty, as originally intended, the booksellers very unwillingly agreeing to this extension, and being circulated about the country by itinerant agents of the booksellers. The subscriptions obtained by the time when the last part was published amounted to 18,000, which, at the subscription price of two guineas each, would have produced £37,900. Each subscriber, by the terms of subscription, was bound to take the whole work of four volumes; and the booksellers contended that they were entitled under their right to one edition, to reprint all the former parts, so as to supply the full number of the subscribers for the last part. This, however, being objected to by Aikman, a submission was entered into for determining the extent of the booksellers' right, and other matters of dispute between the parties. Pending this submission, and when it had merely been decided that the booksellers were entitled to one edition, but before the extent of it had been determined, Aikman entered into an arrangement with the other respondent Ireland, a bookseller in Edinburgh, for publishing a fifth and sixth volume of his History; and accordingly there was advertised to be published by him 'Part 1. Vol. V. 'of a new translation of Buchanan's History of Scotland, with 'continuation by James Aikman, Esq.' Agreeably to this advertisement, there was published by Ireland 'Part 22. Aikman's 'History of Scotland.—Vol. V. Part 1. containing annals of the 'persecution in Scotland,' &c.; and an 'Address' prefixed to it contained the following statement:—'Owing to circumstances 'unnecessary at present to detail, I was obliged to finish my his-'tory to the Union in four volumes, which I have done to the 'best of my ability; but the last part having so much matter to 'compress into little space, left me only room for an abridgment 'of some of the most important occurrences,—a defect, if it may 'be called one, which the fifth volume is intended to supply, by 'giving my readers a full and complete view of the period it em-'braces, one of the most interesting in our history—the annals of 'the persecution. In doing this, I have repeated part of what 'was in the fourth volume, which I could not avoid, to keep up 'the connexion. To those who are not possessed of the preceding volumes, this was absolutely necessary to make it intelligible; and to those who have them, I shall, that they may not 'pay twice for the same thing, give cancels gratis along with the

'last part of the present work, and at the same time directions to 'the binder.'

This part, which was published prior to the last part of the fourth volume, accordingly commenced at a period already gone over more briefly in the fourth volume, and contained, in particular, seventeen pages word for word the same with the manuscript previously given for publication in the twenty-first part to the suspenders. On the quarrel taking place with Aikman, the suspenders advertised a continuation by one Struthers, to be published by themselves conform to the previous volumes by Aikman, and then presented a bill of suspension and interdict against Aikman and Ireland on the appearance of the first part of their continuation, praying to have them interdicted from proceeding further with the publication of the work, on the ground that it tended to injure and interfere with the sale of the four previous volumes, to which they had right.

To this it was answered, That the true object of the suspenders was to secure to themselves the continuation of the work; and that, supposing they should be found entitled to an edition extending to the full number of copies subscribed for when their last part was published, their right could in no way be injured, as each subscriber was bound to take the whole book; so that all that they could possibly be entitled to was in fact already sold; and besides, that, so far from injuring the sale of the previous volumes, it would in fact be benefited, by making the work more complete as a whole.

The Lord Ordinary having reported the bill, it was unanimously refused by the Court.

The Court proceeded on the ground, that the booksellers had in substance sold the whole of the edition to which they had right, and so could not be injured by the publication objected to, even if it had been calculated to produce any injury to the previous part of the work.

T. R. Robertson, W. S.—J. and W. Dymock, W. S.—Agents.

J. Bullock, Pursuer.—*Murray—More.*
A. Crawfurd and Others, Defenders.—*Sol.-Gen. Hope—D. M'Neill.*

No. 335.

Oath.—This was a question depending upon the import of the oaths of several defenders. The Lord Ordinary decerned against them, and the Court adhered.

May 29. 1827.
1st Division.
Lord Eldin.
D.

W. and A. G. Ellis, W. S.—J. M. Lawrie, W. S.—Agents.

No. 336.

A. FRASER, Pursuer.—*Jeffrey—A. M'Neill.*
A. T. F. FRASER, Defender.—*D. of F. Moncreiff—Rutherfurd.*

Entail—Landlord and Tenant.—An heir of entail in possession having granted a lease, binding himself and his heirs to pay for meliorations—Held that an action for payment of them lay against his representatives, and not against a succeeding heir of entail.

May 29. 1827.
1ST DIVISION.
Lord Eldin.
S.

THE late General Simon Fraser executed an entail of his estate of Lovat, in favour of himself and a series of substitutes, reserving power to execute a trust for the liquidation of his debts. He accordingly disponed his estate to trustees for that purpose, declaring that so soon as the objects of the trust should be accomplished, the trustees should denude in favour of the heirs of entail, and that these heirs should be bound to possess under the limitations and restrictions of that entail. The trustees then took possession, and were infeft, and thereafter General Fraser addressed to them this letter:—'As you seem to think written 'authority necessary, I hereby empower you, in my name, to 'promise to the tenants over all my estates meliorations for houses 'and buildings that may be made and erected by them, not ex- 'ceeding three years rent of the respective farms, to be paid at 'their removal by the incoming tenant; and I oblige me and my 'heirs and successors to implement such promise.'

In 1785 the trustees let the farm of Dalcrag to the pursuer for 19 years, at the rent of £16. 12s., and it was stipulated that the pursuer or his heirs should, at the termination of the tack, 'upon their removal from the said lands, be entitled to receive 'from the heritor or incoming tenant the value of such houses 'and buildings, including stone-dikes, as should then be upon 'the said lands,' 'to the extent of three years rent or tack-duty 'thereof, provided the value of the said meliorations should 'amount to so much, over and above the landlord's standard, 'and as ascertained by appraisement.'

In 1802 the trust was terminated by an act of Parliament, and the General being dead, the Honourable Archibald Fraser entered into possession in virtue of the entail, under which he made up titles. In the course of the same year he obtained from the pursuer a renunciation of his lease, and immediately granted to him a new one for 19 years from Whitsunday 1802. By this latter deed it was 'agreed upon between the parties, that at, or 'as soon after the execution of this lease as possible, the whole 'houses, biggings, dikes, and enclosures upon the foresaid posses- 'sion, shall be comprised by one judicious man named by each

'of the parties contractors, agreeably to the terms of the said 'original lease; and that one or more schedules thereof shall be 'made up, to be signed by the appreciators, and by the said 'Honourable Archibald Fraser of Lovat, and the said Alexander 'Fraser, and reference made therein to these presents, whereof 'they shall be considered as part; and the said Alexander Fraser 'agrees to defer all demands on the said Honourable Archibald 'Fraser and his foresaids, on account of the said meliorations, 'until the expiry of this present lease; and further, binds and 'obliges himself and his foresaids to keep, maintain, and uphold 'the said houses, biggings, dikes, and enclosures contained in 'the said states or schedules, in equally good repair and condi-'tion as shall be therein expressed, during the whole currency of 'this present lease, and to leave the whole in the like good con-'dition at the expiry thereof; it being hereby declared, that the 'said Alexander Fraser and his foresaids shall then, and not 'otherwise, be entitled to receive from the said Honourable Ar-'chibald Fraser of Lovat and his foresaids, or the succeeding 'tenant, the sum mentioned in the said schedules or estimates, 'as the value of the said meliorations, provided the same shall 'not exceed the sum allowed for the said meliorations by the said 'lease granted by the said trustees on the estate of Lovat; pro-'vided always, that the said houses, biggings, dikes, and enclo-'sures shall be found, in the manner above expressed, to be 'worth that sum, and also provided, that they shall be found, 'at the expiry of the present lease, to be in equally good con-'dition and repair, and worth as much as they shall be found 'and stated to be in the said schedules and estimates, made at 'the commencement thereof,' &c. In 1816 the Honourable Archibald Fraser died, and was succeeded as heir of entail by Thomas Alexander Fraser, and by the defender as heir of provision and general disponee. On the termination of the lease in 1821, the pursuer brought an action against the defender as representing the late Honourable Archibald Fraser, for payment of meliorations under the lease granted in 1785, in support of which he founded upon the lease of 1802, as containing an obligation to make payment of them.

On the other hand, the defender maintained, That the claim lay only against the heirs of entail, or incoming tenant;—that by the universal practice of the district, those claims lay against the incoming tenant;—that the entail was qualified by the above letter, which was intended to give effect to the local practice;—and that, at all events, the pursuer was bound to have proceeded against the heir of entail in the first place.

To this it was answered, That the late Honourable Archibald Fraser had bound himself and his heirs personally to pay the meliorations;—that he was the party benefited by them, and that the pursuer had no jus actionis against the incoming tenant; nor could he proceed against the heir of entail, as the meliorations were not constituted in terms of the statute.

The Lord Ordinary assoilzied the defender; but the Court altered, and decerned in terms of the libel.

The Judges were unanimously of opinion, that the claim of the pursuer lay directly against the defender, who represented the party by whom the obligation was granted, and who derived the benefit from the meliorations; and that the question as to the liability of the heir of entail had been settled by repeated decisions, and particularly by that of Tod *v.* Moncreiff, Jan. 14. 1823, (ante, Vol. II. No. 110,) which had since been affirmed on appeal.

L. Mackintosh, S. S. C.—Æ. Macbean, W. S.—Agents.

No. 337.

Earl of Aberdeen's Trustees, Pursuers.—*H. J. Robertson.*
C. Gordon, (Shand's Trustee.)—*Sol.-Gen. Hope—Cowan.*

May 29. 1827.
1st Division.
Lord Eldin.
S.

This was a complicated case of accounting, in which three accountants reported in favour of the defender; but the Court, on report of the Lord Ordinary, pronounced judgment in favour of the pursuers.

Morison and Burnett, W. S.—J. Shand, W. S.—Agents.

No. 338.

J. Sharp, Pursuer.—*Jameson.*
G. Thomson and Others, Defenders.—*Marshall.*

May 29. 1827.
2d Division.
Ld. Cringletie.
B.

The Lord Ordinary having struck out certain articles in a condescendence by the pursuer, he presented a reclaiming note, which the Court refused, with a certain reservation in his favour.

Campbell and Macdowall, S. S. C.—Macmillan and Grant, W. S.—Agents.

A. M'KENZIE, Pursuer of a Multiplepoinding.—*Skene.* No. 339.
Mrs. M'KENZIE and T. M'KENZIE, Claimants.—*Jameson.*

Multiplepoinding.—The nominal raiser of a multiplepoinding not obliged to consign till relieved of a cautionary obligation come under by him for the common debtor to a much greater amount than the fund in medio.

May 29. 1827.

2D DIVISION.
Ld. Mackenzie.
F.

A summons of multiplepoinding having been raised in the name of Alexander M'Kenzie, of certain sums owing by him to the common debtor, including a sum for which decree in foro had passed against him, he was required by the claimants to consign the fund in medio. This was objected to by M'Kenzie, on the ground that he was cautioner for the common debtor to an extent greatly beyond the amount of the fund in medio in a confirmation as executor in the Commissary Court; and that, being merely a nominal pursuer, he must be considered in the light of an ordinary defender, who could not be obliged to consign till such an obligation was discharged.

To this it was answered, That he was not entitled to plead retention on grounds existing at the date of the decree in foro against him, and not then stated by him; and, at all events, that he could ask no more than that the fund should remain consigned till he was relieved.

The Lord Ordinary sustained 'the dilatory objection stated 'for the nominal pursuer Alexander M'Kenzie, that he ought 'not in this process to be ordained to make payment or consign-'ation of the funds libelled, or any part of them, until he shall 'be relieved of his liability as cautioner' for the common debtor; and the Court unanimously adhered.

The Court thought, that under the interlocutor the claimants were not precluded from removing the objection to consignation, by finding caution to relieve the nominal pursuer of the effects of his cautionary obligation for the common debtor; and one of their Lordships observed that the case of the Queensberry Executors *v.* Tait (ante, Vol. I. No. 486.) applied directly to the present.

J. ANDERSON, W. S.—T. M'KENZIE, W. S.—Agents.

No. 340. Misses GIBSON, Pursuers.—*D. of F. Moncreiff—Jardine—Boswell.*

R. CRAIG and Others, Defenders.—*Jeffrey—A. M'Neill.*

May 30. 1827. 1ST DIVISION. Lord Eldin. D.

A circumstantial question relative to a right of water for the use of mills. The Lord Ordinary pronounced a special interlocutor, and the Court adhered.

J. BLAIR, W. S.—W. ANSTRUTHER, W. S.—Agents.

No. 341. A. WALKER, Pursuer.—*D. of F. Moncreiff—Jameson.*

W. INGLIS, Defender.—*Skene—Alison.*

Cautioner—Relief.—A party having interposed as cautioner for two distressed cautioners in a debt, which was settled by dividing it into two equal parts, and granting a promissory note for each half; and the interposing cautioner having put his name on both—Held entitled to relief from one of the original cautioners, who alleged that he had interposed for the other cautioner alone.

May 30. 1827. 1ST DIVISION. Lord Eldin. D.

JAMES WILSON, having been appointed agent at Cupar for the Commercial Banking Company, granted a bond, along with Henry Inglis and Thomas Aitken as his cautioners, for the faithful discharge of his office. Soon thereafter Wilson was found to be deficient to the extent of £9000, which was ultimately reduced to £2746: 5: 9. The bank having become urgent for payment, a transaction was entered into with the cautioners, Inglis and Aitken, by which it was agreed that the balance should be divided into two sums of £1373: 2: 10 each, for which bills should be granted by Inglis and Aitken, with cautioners. With this view, a promissory note was granted by Henry Inglis and another party to Aitken, who indorsed it to the pursuer Walker, and by him it was indorsed to the bank. The other bill was also in the form of a promissory note, and was granted by Aitken and Walker to Henry Inglis, who indorsed it to the bank; so that, in this way, Walker became bound as cautioner for payment of the whole debt. The first of these bills having been paid, and the pursuer having been called on to pay the other, he brought an action of relief against the defender Inglis, as representing Henry Inglis.

In defence it was maintained, That the arrangement was, that each of Inglis and Aitken, the original cautioners under the bond, should find caution for his half of the debt;—that accordingly Henry Inglis had got a cautioner for his half, and had retired his bill, and that the pursuer had interposed as cautioner for Aitken, against whom alone he was entitled to claim relief.

To this it was answered, That the pursuer had interposed his credit both for Aitken and Henry Inglis, and that no such arrangement as that alleged had been made.

The Lord Ordinary decerned in terms of the libel, and the Court adhered.

J. MACDONELL, W. S.—G. LYON, W. S.—Agents.

C. MACKINTOSH, Pursuer.—*Skene—Robertson.*
D. G. FORBES, Defender.—*Jeffrey—Tait.*

No. 342.

May 30. 1827.
1st DIVISION.
Lord Eldin.
D.

Road Act.—THIS was a question as to whether the defender had found security for, or paid certain sums under a local road act, in which case he was entitled to resist payment of an assessment. The Lord Ordinary decerned against him for the assessment; but the Court, being satisfied that he was within the protection of the statute, altered, and assoilzied him.

D. M'INTOSH, W. S.—TAITS and YOUNG, W. S.—Agents.

D. BARRY, Pursuer.—*Sandford—Napier.*
J. GEDDES, Defender.—*D. of F. Moncreiff—D. Macfarlane.*

No. 343.

Poor's Roll—Expenses.—A party on the poor's roll cannot be obliged to find caution for expenses; but Observed, that it is not incompetent to oblige him to make payment of expenses previously awarded, before allowing him to proceed with his action.

May 30. 1827.
2D DIVISION.
Ld. Cringletie.
B.

BARRY, who had executed a disposition omnium bonorum in favour of his creditors in a process of cessio, having thereafter raised an action of count and reckoning against Geddes, to whom he had previously conveyed certain property in trust, the latter pleaded in defence, That Barry, being divested by his disposition omnium bonorum, had no title to pursue. The Lord Ordinary found that 'it was not competent for him, hoc statu, to insist in 'this action;' and the Court adhered, remitting to his Lordship to consider the evidence of an alleged retrocession from his creditors produced by Barry along with his reclaiming petition, (see ante, Vol. II. No. 446,) and found him liable in certain expenses. When the cause returned to the Lord Ordinary, Barry produced a retrocession from twelve of his creditors, constituting, however, but a small portion of the whole number, and got himself put on the poor's roll. Geddes then contended, 1. That the retrocession did not afford a title to pursue; and, 2. That, at all events, Barry could not be allowed to carry on the action until he had paid the expenses previously awarded, and found caution to pay any subsequent expenses which might be found due. The Lord Ordinary,

before deciding whether Barry had now, in consequence of the retrocession, a sufficient title to pursue, ordained him to find unexceptionable caution, within a certain time, 'to pay Mr. Geddes 'such expenses as may be awarded to him in the course of this 'action, if the same shall proceed, and also to pay to him the ex-'pense already awarded and taxed, in case the same have not 'been already paid.' Against this interlocutor Barry reclaimed, and the Court holding, from a statement made by Geddes' counsel at the bar, that the previous expenses were settled, and being of opinion that if a party admitted to the poor's roll had truly a title to pursue, he could not be fettered with the obligation of finding caution for expenses, pronounced this interlocutor:—'In 'respect that it has been stated from the bar that the previous 'taxed expenses have been paid or settled for, recall that part 'of the interlocutor of the Lord Ordinary which ordains the re-'presenter Barry to find caution to pay Geddes such expenses 'as may be awarded to him in the course of this action, and remit 'to the Lord Ordinary to hear counsel for the parties farther, and 'thereafter to do in the cause as to his Lordship shall seem just, 'it being competent for the parties to be heard also on the ques-'tion of title.'

LORD ALLOWAY.—The Lord Ordinary seems to hold that this man has a title, and the report of the lawyers for the poor establishes that he has a probabilis causa litigandi. On what ground, therefore, can he be obliged to find caution for expenses? The same rule would apply to every person on the poor's roll, and the consequence would be, that nobody could have the benefit of that provision. It appears to me still more objectionable that he should be compelled to pay expenses already awarded, before he can proceed with his action. This party is just in the situation of any other litigant, and I do not think the Lord Ordinary can do more than pronounce decree for expenses, so that diligence may pass on it, to the effect of enabling the party to recover them in the usual way; but I have no conception that the action can be stopped till they are actually recovered.

LORD JUSTICE-CLERK.—That part of the interlocutor ordering the previous expenses to be paid is conformable to the practice of the Court in other matters. If they are settled, however, that question is at an end; but we have no right to impose the penalty of finding caution for future expenses, if the title be once admitted. This, however, remains for the consideration of the Lord Ordinary.

LORDS GLENLEE and PITMILLY concurred.

Pursuer's Authority.—Carling, March 10. 1826, (ante, Vol. IV. No. 359.)
Defender's Authority.—Manuel and Co. Jan. 21. 1826, (ante, Vol. IV. No. 259.)

J. MACALLAN, W. S.—J. SINGER, W. S.—Agents.

R. SPEIR, Pursuer.—*Bell—Shaw.*

J. DUNLOP, Defender.—*D. of F. Moncreiff—Cuninghame.*

No. 344.

Stat. 1696, *c.* 5.—*Bankrupt — Expenses.*—1.—Held, on a remit from the House of Lords, and altering the previous judgment in the cause, (ante, Vol. IV. No. 74.) That a payment in cash by a bankrupt, within sixty days from his bankruptcy, to an indorser of a bill accepted by him but not then due, 'as a provision for 'payment of the said bill when it became due,' is reducible under the act 1696, c. 5, independent of fraud at common law.—2.—Question raised, but not decided, whether, on a simple remit to review, it be competent to award expenses in the House of Lords.

May 30. 1827.

2D DIVISION. F.

IN a reduction at the instance of Speir, trustee on the sequestrated estate of John Dunlop, for setting aside a payment of £220 made by the bankrupt, within sixty days of his bankruptcy, to his nephew, the defender James Dunlop, as a preference struck at by the act 1696, and as a fraud at common law, the following issue was sent to a Jury:—'It being admitted that a bill for '£220, dated 6th September 1820, payable three months after 'date, and due on 9th December 1820, accepted by John Dun-'lop, was indorsed by James Dunlop, and discounted at the 'branch of the Commercial Bank at Beith previous to the 18th 'October 1820: It being also admitted that the estate of John 'Dunlop was sequestrated on the 2d day of December thereafter: 'It being also admitted that the said John Dunlop sold to Wil-'liam Dunlop, uncle to James, certain houses for the sum of '£600 on 18th October 1820: Whether, within sixty days of 'the admitted bankruptcy of the said John Dunlop, the defender 'James Dunlop did enter into an agreement or concert with the 'said John Dunlop, the bankrupt, for the purpose of obtaining 'security or payment of the foresaid bill for £220, and did for 'that purpose contrive and assist in carrying into execution the 'sale of the bankrupt's heritable property aforesaid? And whe-'ther the defender, by means of the said sale, did obtain from the 'said John Dunlop the sum of £220 out of the proceeds of the 'said sale on the said 18th day of October 1820, or previous to 'the 9th day of December 1820, in satisfaction of the said bill, 'or as a provision for payment of the said bill when it became 'due?' On this issue a verdict was returned, finding 'that within 'sixty days of the admitted bankruptcy of the said John Dun-'lop, the defender James Dunlop did not enter into any agree-'ment or concert with the said John Dunlop, the bankrupt, for 'the purpose of obtaining security or payment of £220; and that 'the defender James Dunlop, by means of the sale, did obtain 'from John Dunlop, by the hands of his wife, the sum of £220 'on the said 18th of October, as a provision for payment of the 'said bill when it became due.' This verdict having come to be

applied in the Court of Session, their Lordships repelled the reasons of reduction, and assoilzied, as mentioned more fully ante, Vol. IV. No. 74, (which see.)

An appeal was then taken by the pursuer against this judgment, in which the House of Lords ordered, 'That the said 'cause be remitted back to the Court of Session in Scotland to 'review the interlocutors complained of, and to consider whether, 'consistently with the findings of the Jury, the payment or de- 'posit of the £220 was or was not reducible under the provisions 'of the statute 1696, or otherwise; and, after reviewing the said 'interlocutors complained of, that the said Court do and decern 'in the said cause, as may be just.'

On a petition being presented to apply this judgment, the Court ordered Cases, in which the same pleas were maintained as had been argued in the House of Lords;* and, on advising these Cases, the Court altered their former interlocutor, and reduced, decerned, and declared in terms of the libel.

The pursuer then made a motion to have the expenses formerly awarded against him, and paid under interim execution, repeated, and to be found entitled to the whole expenses of process, including those of the appeal. The Court, without deciding that it was incompetent to award the expenses of the appeal, held that at all events they ought not to be allowed in this case. Their Lordships, however, ordered repetition of the expenses paid by the pursuer under the interim execution, and found him entitled to the expenses in this Court prior and subsequent to the appeal,—the former subject to modification; but found neither party entitled to the expenses of the Jury trial.

Lord Justice-Clerk.—I concurred in the judgments formerly pronounced, but with very considerable hesitation. I have reconsidered the case, and am now satisfied, attending to the remit by the House of Lords, and the view taken by the noble and lamented Lord who moved the judgment, that the act 1696 does strike at this transaction, and that we must now decern in terms of the libel. The careful terms in which the matter has been remitted deserve particular attention, viz. 'to consider whether the payment or deposit was or 'was not reducible,' &c. It has always been maintained that this was a direct payment; but it is clear, from the words 'payment or 'deposit,' that we have an indication of what were the difficulties felt in the House of Lords. Now, when we look at the second finding of the Jury, this word 'deposit' applies accurately to what is thereby found to have taken place. It is impossible to hold that the Jury

* See Speir v. Dunlop, May 22. 1826, Wilson and Shaw's Appeal Cases, p. 253.

found that the £220 was given in payment of the bill; on the contrary, they found that it was 'as a provision for payment' when the bill should fall due. They found that this took place on the 18th of October, the bill not being due till the 9th December. That being the state of the facts, the question of law is this—Does a depositation of money in the hands of a party, jointly liable on a bill, to answer the bill when it becomes due, fall under the statute 1696? I see no case quoted by the defender which is similar to this. Even the strongest, that of Ferrier, is not at all parallel. Here the full sum was given to a man who might put it into a bank to fructify for his own behoof. Now, is it any stretch of the act 1696 to say that this is money lodged in security of a debt not due? If it had been found in the verdict that it had been handed over in immediate payment, we might have been hampered by it; but that is not the finding of the Jury. It is not a payment in immediate liquidation, but for provision, &c.; and if it be, as such, brought under the act 1696, it supersedes the necessity of any investigation as to fraud. It is said that the other finding of the Jury prevents the operation of the act, by finding no concert or agreement. But although that is negatived, it does not meet the other part, that the payment was as a provision for a bill not due, for under the act it is not necessary to prove fraud; and although it may be competent, under the words of the remit, 'or otherwise,' to take into view the question as to common law, I am inclined to lay that aside as unnecessary, and to rest my opinion entirely on the act 1696.

Lord Pitmilly.—I never felt greater difficulty in any case. I am sensible of the change produced by the remit; but still I cannot say I have made up my mind decidedly. I am much moved by this, that, according to the argument now insisted in, the Jury trial has been entirely thrown away. The verdict has decided nothing that has not been admitted from the beginning. The payment of £220 was admitted from the beginning. It is said that this was an admission of a different kind, viz. admission of payment, while the verdict says it was a provision for payment. But the history of the bill was known and admitted, and that it was not payable till 9th December; so that all the facts were clearly admitted. This, to be sure, does not go to the point of law, although it would go to this, that the pursuer should pay the previous expenses; for what was the use of going on with the trial, if at last it was to be put on the point of law, which was equally open before the trial? But they would not give up the plea of fraud, and were only driven from it by the verdict of the Jury. This occasions my doubts; for, if it was not for the verdict, it would have been a very different case, and there would have been little difficulty in deciding it as it stood before the trial. Although, however, I have great hesitation in viewing the case in the same light now, when the allegation of fraud has been made and negatived, yet I am not prepared to oppose the judgment proposed to be pronounced.

LORD ALLOWAY.—I have again considered this case most attentively. If it had been to be decided on the admissions before the trial, I should have come to the conclusion that they were sufficient for making out the pursuer's case, and I do not see why this cause was ever sent to a Jury. But it did go to a Jury, and on an issue not fit to try the case. The issue should have been, Was this a bonâ fide payment under the statute of 1696? In my former opinion I was misled on two points. The Lord Ordinary had taken the admissions, &c. in addition to the verdict, and I considered the verdict like an oath on reference; but in entertaining that opinion I was carried a little too far. I also considered that this might be held a fair bonâ fide payment, but I am satisfied I was wrong. I admit that a payment in cash is not affected by the act 1696, but it must be a fair bonâ fide payment, according to the ordinary course of transactions of mankind. In Ferrier's case, the bill was sent at the ordinary usance,—it was a regular payment in the ordinary course of trade; and I cannot compare that with the present, which is not a payment at all, but a provision, and quite different from the cases of bonâ fide payment referred to. There is therefore an end to the question, and we see that what they hold to be a bonâ fide payment in England is totally different from this; and as I cannot hold it to be a payment, I must consider it as clearly affected by the act 1696. If compelled to give an opinion on common law, I might come to the same conclusion, but the grounds I have stated are sufficient.

LORD GLENLEE.—It would be superfluous for me to enlarge on the question, as I was formerly against the interlocutor. On the question of expenses, it may have some influence that the Jury trial was unnecessarily resorted to, but it can have no effect on the judgment to be pronounced.

Pursuer's Authorities.—2. Bell, 222. 243; Moncreiff, Feb. 8. 1694, (1054); Creditors of Carlowrie, Jan. 15. 1695, (4930); Bradley, April 26. 1793, (5. T. R. 202, 2. Bell, 227); M'Math, March 1. 1791, (Bell's Cases, 22); Forbes, Jan. 27. 1715, (1124); Durward, Feb. 2. 1700, (1119); Campbell, Jan. 16. 1713, (1120); Manson, July 16. 1671, (App. 7. *v.* Bankrupt); Brown, July 6. 1764, (886); Marshall's Trustee, Jan. 21. 1794, (1144); Young, July 9. 1736, (Elchies, No. 7. *v.* Bankrupt); Crawford, Nov. 16. 1752, (ibid. No. 28); Blaikie, May 9. 1781, (887); 4. Ersk. 1. 43; Barbour, May 30. 1823, (ante, Vol. II. No. 335); Vernon, (2. T. R. 648); Tamplin, (2. Campbell, 312.)

Defender's Authorities.—4. Ersk. 1. 41-4; 2. Bell, 225-255-257; Elchies, *v.* Bankrupt, No. 26; Durward, Feb. 2. 1700, (1119); Campbell, Jan. 16. 1713, (1120); Buchanan, Jan. 25. 1733, (1125); Forbes, Jan. 26. 1751, (Kilk. and 1043); Bean, Aug. 1. 1760, (907); Ferrier, June 2. 1808, (2. Bell's Com. 229.)

W. PATRICK, W. S.—R. DUNLOP, W. S.—Agents.

J. GREIG, W. S. Suspender.—*Cuninghame.*
C. PEEBLES, Charger.—*D. of F. Moncreiff—Baird.*

No. 345.

Interest.—Circumstances in which a party who had purchased an estate burdened with an heritable security, but which was subsequently set aside, was held liable only in four per cent. interest on the part of the price corresponding to the amount of the debt till set aside, and thereafter in five per cent.

May 31. 1827.

1ST DIVISION.
Lord Eldin.
S.

THE estates of James Harkness, proprietor of Glenlean, having been sequestrated under the Bankrupt Act, Peebles was appointed trustee, and as such acquired right to Glenlean. That property was burdened with several heritable securities, and particularly with one for £1200 in favour of Robert Watson. The property was afterwards sold by Peebles to David Greig, writer in Greenock, for behoof of the son of the bankrupt, at the price of £2500, payable at Whitsunday 1823, which was declared to be the term of entry. For payment of this sum David Greig became personally liable, and James Greig, writer to the signet, interposed as cautioner. The latter, having been obliged to pay the price, acquired right to the purchase. A dispute having then occurred as to the payment of the price in consequence of the existence of the burdens, a suspension was brought by Mr. Greig, and also a multiplepoinding, in which he consigned the balance remaining after deduction of the heritable securities. An action was thereafter brought by Peebles for setting aside the heritable security of Watson, on the ground of irregularities, in which he succeeded, on the 9th of December 1825. (See ante, Vol. IV. No. 213.) In this way the £1200 fell to be paid to Peebles, and a question then arose between him and Greig as to the rate of interest for which the latter was liable on the sum of £1200 thus set free. The Lord Ordinary found that 'James Greig, who is now in right of 'the purchaser of the lands of Glenlean, is only liable in interest 'on the price thereof, at the rate of four per cent. per annum, from 'the term of entry till he receive a disposition of the lands.' Peebles then reclaimed, and contended, That he ought to be liable in five per cent. from the date of the purchase, seeing that he ought to have consigned the whole sum; or that, at all events, he was liable at that rate from the time the heritable security was reduced. The Court pronounced this interlocutor:—

'Recall the interlocutor complained of; find the said James 'Greig, now in right of the purchaser of the lands in question, only 'liable in four per cent. upon Mr. Watson's debt, until Mr. Watson's 'heritable security was set aside, after which find the said James 'Greig is liable in five per cent. upon the said debt; and find the

'said James Greig liable in five per cent. upon the balance of the 'price of the lands in question, except in so far as the same has 'been consigned by him.'

W. WADDEL, W. S.—J. GREIG, W. S.—Agents.

No. 346.

J. and W. DOVE, Pursuers.—*D. of F. Moncreiff—Skene.*
A. SMITH and Others, Defenders.—*Jeffrey—Jameson—G. Bell.*

Et è contra.

Testament.—A party who had made a testament in America, disposing of all his property, having thereafter come to Scotland, and executed a mortis causâ assignation of the stocking of a farm there, and having subsequently recalled that assignation, and declared that the farm-stocking 'should be considered as part 'of his executry, and be regulated by the general law of moveables in its appro- 'priation,' but not having revoked his testament—Held that the farm-stocking fell to be distributed under the testament, and did not go to the nearest of kin according to the law of Scotland as to intestate succession.

May 31. 1827.
2D DIVISION.
Ld. Mackenzie.
F.

IN 1811 the late William Dove, then resident in New York, America, executed a last will and testament, whereby he bequeathed his whole property, heritable and moveable, to certain persons, and appointed Smith &c. to be his executors. He afterwards came to Scotland, and took a lease (secluding assignees) of the farm of Trogden in the county of Roxburgh for 21 years after Whitsunday 1813, which he stocked, and occupied till his death in 1824. In 1815 he, with consent of the landlord, executed an assignation, by which, in the event of his death, he conveyed to his brother, the pursuer John Dove, in liferent, and John's second son in fee, whom failing, to certain other persons, the lease of the farm of Trogden, 'and also the whole farm-stock- 'ing of every description which might be upon the said farm 'at his the said William Dove's death.' But in 1818 he subjoined to this assignation a codicil in the following terms:—'I 'William Dove, considering that by the within assignation I 'had assigned and disponed to and in favour of my brother John 'Dove, whom failing, as within mentioned, the whole farm-stock- 'ing of every description on my farm at the time of my death: 'And now considering that it is my wish that the said farm-stock- 'ing should be considered as part of my executry, and be regu- 'lated by the general law of moveables in its appropriation: 'Therefore I hereby recall such disposition and assignation in 'so far as concerns the said farm-stocking, but confirm the within 'deed in every other respect.' Under this codicil, declaring that the farm-stocking should be considered as part of the testator's executry, and be regulated by the general law of moveables in its appropriation, it became a question, after his death, whether

the farm-stocking was to be divided among the nearest of kin, according to the law of intestate succession in Scotland, or whether it was to fall under the distribution of the will executed in America, and which had never been revoked either in whole or in part. To have this tried, mutual actions were raised by Smith &c., the executors under the will, and by John and William Dove, the nearest of kin. In these conjoined actions the Lord Ordinary assoilzied the executors from the conclusions of the action at the instance of the nearest of kin, and decerned against the latter in the declaratory conclusions at the instance of the executors, thereby finding that the farm-stocking in question fell to be distributed along with the other executry, agreeably to the provisions of the will executed in America.

The Court unanimously adhered.

W. MACKENZIE, W. S.—LOW and RUTHERFORD, W. S.—Agents.

J. M'NAIR, Pursuer.—*D. of F. Moncreiff—Jameson—Ivory.* No. 347.
R. GRAY and J. WOODROP, Defenders.—*Jeffrey—Forsyth—Skene.*

Decree-Arbitral.—Arbiters under a submission, which empowered them to pronounce interim decrees, and declared that although the submission should expire as to points on which they differed in opinion, it should still continue as to those on which they agreed, having pronounced two interim decrees, copies of which only were delivered to the parties, the principals remaining in the hands of the clerk; and having afterwards declared the submission terminated, and declined to pronounce any deliverance on a memorial by the clerk as to a demand made by one of the parties to have the interim decrees put on record—Held that the decrees were invalid.

May 31. 1827.

2D DIVISION. Ld. Mackenzie. M'K.

THE pursuer Mr. M'Nair, and the defender Mr. Gray, were proprietors of different fields of coal, of which that belonging to Mr. M'Nair had the higher level. In consequence of some operations on the part of M'Nair which threatened to flood with water the inferior fields which were occupied by Mr. Woodrop along with Mr. Gray, and were alleged to have already occasioned considerable damage, the parties entered into a submission. By this submission, M'Nair on the one hand, and Gray and Woodrop on the other, referred to two gentlemen, chosen as arbiters, 'all 'disputes, differences, debates, and debateable matters being and 'subsisting between them, and all debts, claims, and demands due 'and competent to the parties, or either of them,' relative to their respective collieries, with power to the arbiters 'to pronounce de-'cree or decrees, partial or total, interim or final.' The parties bound themselves to fulfil and perform 'whatever decree or de-'crees, partial or total, interim or final, the said arbiters in one

'voice shall give forth and pronounce;' but it was declared 'that 'the said arbiters shall not have power to name an oversman to de- 'cide between them in case of their differing in opinion; but that, 'in case of their so differing in opinion, this submission shall fall 'and expire, but only as to those points on which they so differ, 'and shall subsist and remain in full force as to any point or 'points in which they may agree in opinion.'

The arbiters named having accepted the submission, they, after some procedure, pronounced an interim decree-arbitral, finding that M'Nair had no right to cause the water of a certain field to flow into the colliery of Messrs. Gray and Woodrop, or to carry on any operation which might produce that effect, prohibiting him from doing so, and finding him liable in the damages which might be sustained by them or their successors, in the event of his contravening this prohibition, and also reserving the consideration of the other points submitted. This interim decree was duly tested; it contained a clause of registration, and copies were, on the same day on which it was signed, sent to the parties, but the original remained in the hands of the clerk to the submission. Some months thereafter the arbiters pronounced a second interim decree, proceeding on the narrative that they had 'pronounced and issued an interim decreet-arbitral,' (being that above mentioned,) and that they now judged 'it proper and 'necessary to pronounce a second interim decree-arbitral in the 'said matters.' By this decree the arbiters, after referring to the former one, 'a copy of which interlocutor was given out 'to the agent for each party of the date it bears, and which in- 'terlocutors we hereby adhere to and confirm,' prohibited M'Nair from using a particular pump or other artificial means for raising the water in his colliery to such a level as would make it issue into the coal-field of Gray and Woodrop; found him liable in the damage already occasioned by the use of the pump from a certain date, and appointed Gray and Woodrop to give in a condescendence of the damages claimed on that account. This decree contained, like the former, a reservation of the further points to be determined, and a clause of registration. It was also duly tested, and copies were sent to the parties; but the original remained in possession of the clerk.

Gray and Woodrop then gave in a condescendence of their claims; but shortly thereafter, and before this condescendence was answered, the arbiters, without having altered or recalled either of the interim decrees, subscribed a minute finding the parties liable in the account incurred by the clerk, and declaring the submission terminated, without, however, stating that they

had differed in opinion, or setting forth any ground for their so terminating it. It appeared that, previously to this, Gray and Woodrop had made a demand that the clerk should put the interim decrees on record, which demand the clerk submitted to the arbiters in a memorial, but the arbiters, in the minute above mentioned, 'declined to give any deliverance thereon.' On this the clerk brought a multiplepoinding, to have it determined which of the two parties was entitled to the possession of the original interim decrees, and thereafter M'Nair brought a reduction to have them set aside, on the grounds, 1. That the arbiters had not exhausted the submission; and, 2. That the decrees had not been delivered.

These processes having been conjoined, the Lord Ordinary appointed Cases to the Court, in which it was contended for M'Nair,

1. That the recording or delivering a decreet-arbitral was essential to its validity, for, so long as it was undelivered, the arbiters might recall or alter it; and their not delivering the decrees, and their virtual refusal to do so in the present case, was equivalent to a recall, or at least showed that they differed in opinion with regard to these decrees, while the submission required that they should concur to make them effectual; and it was offered to be proved by examination of the clerk and arbiters, that, after the decrees were pronounced, one of the arbiters had altered his opinion, and was satisfied that the judgments were erroneous, and had on that ground refused to concur in the delivery; and,

2. That the decrees were null in respect of the arbiters not having exhausted the matters submitted; for although they were entitled to give interim decrees, these must still be held subject to the ordinary rule, that they were not to be ultimately binding, unless the arbiters should give a final decision on all the points submitted, which they had illegally refused to do in the present case.

On the other hand, it was pleaded,

1. That the recording or delivery of the principal decree is not essential to its validity, if it appear that it is the joint decision of the arbiters;—that this was sufficiently established in the present case by the decrees, which were never recalled, and that it was incompetent to prove any alleged change of opinion by parole evidence; and further, that the sending of copies of the decrees to the parties was in truth an issuing of them, and was so held by the arbiters, who, in the narrative of the second decree, state that the former one had been 'pronounced and *issued*' by them; and,

2. That the application of the rule contended for by the pursuer

was completely excluded by the terms of the submission, which had contemplated the case of its expiring by the arbiters differing on particular points, and the necessary consequence of the whole matters submitted not being decided, the arbiters having no power to appoint an oversman, and had accordingly stipulated that they might pronounce interim or partial decrees, and that, though they differed on particular points, the submission should subsist as to those on which they were agreed.

The Court, by a majority, found 'it unnecessary to reduce 'the said interim decrees, the same never having been complete or 'valid decrees-arbitral; but, in terms of the declaratory conclu-'sions, found the same to be null and void, and declared the sub-'mission terminated, and the parties released therefrom,' and found it unnecessary to pronounce any judgment in the process of multiplepoinding and a relative advocation.

LORD PITMILLY.—It is necessary to consider together both of the objections taken to these decrees-arbitral by the pursuer, as the second aids the first very much. As to the first, if both the arbiters had concurred in wishing to recall the decrees, I have no doubt but that they might have done so to the very last. The case of Robertson v. Ramsay is an authority in point; and the opinion of Lord Braxfield, lately published by Mr. Brown, is entitled to great weight; and when, on a point of pure Scotch law, we find such authority, I am not inclined to go further; nor is the case of Simpson a contrary authority, as the arbiter there was functus. If, then, it was competent for both to recall the decrees, I do not think it alters the matter that one only refuses to deliver them. The second objection confirms the first, as the arbiters declare the submission at an end, because they differ on the points decided in the decrees already pronounced, of which I think there is sufficient evidence. If they did not exhaust the whole matter referred to them, the submission flew off; and I therefore think that both objections are well founded.

LORD ALLOWAY.—I take a different view of this question. So far as we are to proceed on authority, there is none exactly applicable to this case. In the case of Simpson there was a positive decree cancelling the former one. There is nothing of that kind here, and I hold the decrees in this case to have been regularly issued, the clerk having sent copies to both parties, and the arbiters themselves stating in the second decree that the first was issued. It seems to be conceived that the arbiters could not give a decree till they had settled the whole matters in dispute; but it was provided by the submission that they might give interim decrees, and that, if they afterwards differed, they might give up. I cannot hold that they differed on the subject of these two decrees, as we cannot resort to the examination of the arbiters to explain their decree, or receive their evidence.

LORD JUSTICE-CLERK.—I concur with Lord Pitmilly. We have here a memorial by the clerk, asking leave of the arbiters to record the decrees. This they refuse, and I cannot hold them delivered by copies being sent to the parties. The word 'issued,' used by the arbiters in the second decree, is employed in the same sense as we talk of issuing notes, merely communicating them to the parties, but not delivering them as valid decrees. To constitute delivery, it must be the principal, and not a copy, which is delivered; and I conceive that the case of Robertson, and the opinion of Lord Braxfield, directly apply. As to the other objection, I have also great difficulty. It does not appear to me to be a case where the clause in the submission applies; but the first is sufficient to decide the case.

LORD GLENLEE.—I am of the same opinion.

Pursuer's Authorities.—Robertson, June 20. 1783, (653,) and Lord Braxfield's Opinion in it, (2. Hailes, 912); Mortonhall *v.* Ross, (in Papers of Simpson, Dec. 10. 1736, 17007); Carse, A. S. Dec. 17. 1783, Aff. in H. of L.

Defenders' Authorities.—4. Erak. 333-39; Lord Lovat, June 22. 1738, (625); Glover *v.* Glover, 1802, Aff. 1805, (not rep.); Robertson, June 20. 1783, (653); Simpson, Dec. 10. 1736, (17007); Wardrop, Feb. 4. 1794, (628.)

GIBSON-CRAIGS and WARDLAW, W. S.—G. DUNLOP, W. S.—Agents.

GIBB and M'DONALD, Pursuers.—*Jeffrey.*
Sir PAUL BAGHOTT and Others, Defenders.—*Sol.-Gen. Hope—Skene—Whigham.*

No. 348.

Process.—A summons having been raised on the allegation that the pursuers had been induced by the defender to enter into a contract by fraud, and that he had committed a fraud in implementing it, and concluding for repetition of money advanced on the faith of due implement, and for damages—Held not necessary to set aside the contract by a reduction, before insisting in these conclusions.

June 1. 1827.

1st DIVISION. Lord Meadowbank. 8.

GIBB and M'DONALD, shawl-manufacturers in Edinburgh, brought an action against Sir Paul Baghott, and Paul Wathen and Company, of which they alleged he was the sole partner, setting forth in the summons that Sir Paul having fraudulently represented to them that he had the means of importing Cashmere wool directly from Cashmere, and had discovered the mode of spinning the wool into yarn, which had been hitherto unsuccessfully attempted, and that he would secure to them an exclusive supply of such yarns, they had been induced to enter into an agreement with him, 'whereby the said Sir Paul Baghott, and 'Paul Wathen and Company on the one hand, agreed to supply 'the pursuers with the whole yarn to be spun by them as afore-'said, and the pursuers, on the other hand, agreed to purchase the 'same, and to pay therefor certain high prices specified in the

'missives interchanged between the parties, and varying in 'amount according to the fineness of the yarns furnished, which 'prices, it was agreed, should be reduced so soon as, by the com- 'pletion of the new and improved machinery, which was said to 'be in progress, the said Paul Wathen and Company should be 'enabled to spin yarn in greater quantity, and of better quality.' They then proceeded to state, that on the faith of this contract they had laid out large sums of money, and had received quantities of yarns, for which they had paid the stipulated prices, but that they had discovered that the whole had been a fraudulent mis- representation, and 'that instead of importing the Cashmere wool 'directly from Cashmere, and spinning the same in England, as 'pretended by the said Sir Paul Baghott, the alleged first and 'true inventor thereof, the yarns forwarded to the pursuers, as 'having been spun in England, were purchased by the said Sir 'Paul Baghott, or Paul Wathen and Company, in France, or 'elsewhere on the Continent, where the art of spinning Cashmere 'wool had been discovered, and where the yarns may be pur- 'chased in open market.' They further stated, 'that in conse- 'quence of the false and fraudulent representations of the said 'Sir Paul Baghott, or Paul Wathen and Company, and of the 'deceptions practised by him or them upon the pursuers, where- 'by the latter were induced to enter into and continue the con- 'tract before mentioned, the said contract is, in law and equity, 'null and void ab initio; and the pursuers are not only entitled 'to repetition from the said Sir Paul Baghott, or Paul Wathen 'and Company, of the foresaid sum of £600 paid to them above 'the fair market price of the foresaid yarns, but are also entitled 'to indemnification and reparation for the loss and damage which 'they have sustained, or may sustain, in consequence of having 'been led to embark in a new and extensive manufacture by the 'false and fraudulent representations aforesaid.' The conclusions of the action were, that 'therefore the said Paul Wathen and 'Company, and Sir Paul Baghott, ought and should be decerned 'and ordained, by decree of the Lords of our Council and Ses- 'sion, conjunctly and severally, to make payment to the pursuers 'of the foresaid sum of £600 sterling, or such other sum, more 'or less, as shall be ascertained, in the course of the process to 'follow hereon, to be the excess of the sums paid by the pursuers 'to the said Paul Wathen and Company, or Sir Paul Baghott, 'above the market price of the Cashmere yarns received by the 'pursuers in manner before mentioned: And further, the said 'Paul Wathen and Company, and Sir Paul Baghott, ought and 'should be decerned and ordained, by decree foresaid, conjunctly

'and severally, to make payment to the pursuers of the sum of '£5000 sterling in name of loss and damages sustained by them.'

In defence, the allegations in the summons were denied, and it was pleaded, That as the contract was one of a current nature, and was declared that it should not come to an end till three months notice was given, and as the conclusions of the summons rested upon allegations that it had been entered into by means of fraud and deception, the action was irregular, as there was no conclusion for having it reduced and set aside.

To this it was answered, That the conclusions of the action rested upon the allegation that a fraud had been committed in implementing the contract, by delivering a species of article different from that which was there stipulated, and therefore there was no necessity for setting aside the contract, which might be brought to an end by giving three months notice, and to which the present action was equivalent.

The Lord Ordinary repelled the defence, and the Court adhered.

LORD BALGRAY.—The chief difficulty arises from the statement in the summons, that the contract is null and void. It is plain, however, from the conclusions, and from the allegations in general, that the object is not to set aside the contract, but to obtain indemnification for non-implement.

LORD GILLIES.—The question which is raised here is, whether the pursuers can plead fraud by exception? But the action is not rested so much on the contract being entered into by means of fraud, as by a fraud being committed under the contract. Where a ground of action is excluded by the existence of a deed, it is necessary to set aside that deed in order to maintain the action. So, in the Queensberry cases, it was necessary to reduce the leases, because, till they were set aside, they afforded a good title of possession, and consequently an effectual defence. If, therefore, the defenders could found on this contract as a defence against the claim now made, then it would be necessary for the pursuers to set it aside. But that is not the nature of this action. It is no doubt true, that there is some difficulty arising from the allegation in the summons that the contract is null and void; but I do not think that it is sufficient to prevent the pursuers from insisting in the conclusions of this action.

LORD CRAIGIE.—I could never see any difficulty in this case at all. The substance of the summons is, that the defenders undertook to do what they were unable to perform, and therefore the pursuers seek for damages.

LORD PRESIDENT.—I am of the same opinion. The action is truly for non-implement; and the allegation of fraud is directed to that point,—the statement being, that the defenders agreed to furnish

Cashmere wool from Cashmere, whereas that which was delivered was not so.

RITCHIE and MILLER, S. S. C.—T. BRUCE, W. S.—Agents.

No. 349.

Mrs. SLOAN, Pursuer.—*Cuninghame—Maitland.*
J. BIRTWHISTLE, Defender.—*Sol.-Gen. Hope—Graham Bell.*

Triennial Prescription—Stamp.—Held,—1.—That the production, in an action by a defender, of an account for goods furnished within three years from its date, as a counter claim against the pursuer, interrupted prescription;—and,—2.—That written acknowledgments for money advanced by a party not a banker, but who was truly making the advances in that character, did not require to be stamped.

June 1. 1827.

1st DIVISION. Lords Alloway and Eldin. D.

THE late Alexander Birtwhistle, manufacturer, and Mrs. Sloan, innkeeper at Gateside, carried on a variety of transactions together,—he furnishing her with corn, beef, and other articles, while she advanced to him money to pay his tradesmen, hired chaises to him, and allowed his tavern bills to remain unpaid; so that, at the period of his death in 1810, their accounts were in considerable confusion. She then brought an action of count and reckoning against the defender, his heir, embracing a great number of claims, in defence against which he founded on counter claims, and denied the existence of several of the claims made by the pursuer. In the course of the discussion two questions arose; first, whether an account for beef, alleged by the defender to have been furnished to the pursuer, was prescribed; and, second, whether certain unstamped acknowledgments by the late Mr. Birtwhistle for money advanced to him by the pursuer were probative. In regard to the beef account, the facts stood thus:—It amounted to £610—terminated on the 19th of December 1808,—was regularly entered in Mr. Birtwhistle's books—and the pursuer admitted that it had been contracted to the extent of £450; but she qualified her admission with the statement that she had paid £316. The action was raised in October 1810, and defences were lodged in February 1811; but the account was not produced with them. On the 5th of March 1811 a diligence was granted for recovering all books, accounts, &c., under which Mr. Birtwhistle's ledger, containing the account, was produced on the 11th of May, and it was lodged in process before the 18th of June. A copy of this account was also lodged in process; but it did not appear at what precise time this had been done.

The facts relative to the unstamped documents were these:—Mr. Birtwhistle was engaged in extensive manufactories at Gateside and other places; and there being no banker nearer than Kirkcudbright, the pursuer was in the practice of accommodating

him with money to pay his workmen, for which he gave her acknowledgments on unstamped slips of paper.

On the part of the pursuer it was objected that the beef account was prescribed; and on that of the defender that the unstamped documents could bear no faith. Lord Alloway found, 'with regard to what is called the beef account, that as the triennial prescription has run, the pursuer's admission of a certain part of it being due must be taken along with the qualification accompanying it; and therefore, if the defender shall insist that more is due than what the pursuer has acknowledged on this account, it must be proved by the pursuer's writ or oath; and that the objection as to the stamps is not well grounded, the transactions vouched by the documents being mere cash transactions in the course of carrying on the business of the parties; and although the pursuer was not a banker, yet, in advancing cash to Mr. Birtwhistle, she stood in that situation, she being an innkeeper, getting ready cash, and there being no bank nearer than Kirkcudbright, which is fifteen miles distant,' and therefore repelled the objection; and to this interlocutor Lord Eldin adhered.

The defender having reclaimed, the Court, after appointing 'the parties to lodge mutual minutes, stating specifically what they allege as to the date of lodging in process the beef account,' found that 'the beef account was produced in process within such period as to exclude the plea of prescription, and that the same is instructed by the admissions of the pursuer, and by the books of the late Mr. Birtwhistle; and therefore altered the finding of the Lord Ordinary as to that account in the interlocutor,' but adhered on the other point, and remitted to him to proceed accordingly on these and the other parts of the cause. His Lordship having thereafter, on the report of an accountant, decerned for a certain sum against the defender, and he having reclaimed, the Court in part adhered, and in part altered.

Pursuer's Authorities.—(1.)—3. Ersk. 4. 12; Tait on Evidence, 457; Ferrier, July 9. 1811, (F. C.)

D. Turnbull, W. S.—D. and R. Blaikie, W. S.—Agents.

No. 350.

A. ANDERSON, Pursuer.—*More.*

R. RINTOUL and Others, Defenders.—*D. of F. Moncreiff—Fullerton.*

Proof—Qualified Admission.—Held that a qualified admission must be taken as it stands, as a piece of evidence along with the rest of the proof; but that it is competent to redargue by contrary evidence the qualification adjected.

June 1. 1827.

2D DIVISION. Ld. Cringletie. M'K.

THE late Robert Rintoul, by his deed of settlement, executed in 1806, left to Mrs. Anderson, the only daughter of his first marriage, and the wife of the pursuer, £50 in full of all claims competent to her in consequence of his death. This sum not being considered equal to the legitim, her husband, the pursuer, raised an action against the defenders (who were children of Rintoul by a second marriage) for payment of his wife's share of legitim.

In defence against this action it was pleaded, That Anderson had, in the lifetime of Rintoul, received two sums of £100 each, as part of his wife's share, and that he was bound to collate these sums.

Anderson, in a condescendence signed by himself, admitted the receipt of these sums, but under the qualification that they had been paid to account of what was due to Mrs. Anderson as executrix of her mother, Rintoul's first wife, out of the goods in communion at the period of her death. The defenders then craved a proof to show that the sums advanced to Anderson were not payments to account of his wife's claim for her mother's executry; but the Lord Ordinary refused this, and repelled the defences, 'in respect there is no evidence of £200 having 'been paid to the pursuer but his own admission, qualified by 'an explanation that the money was paid to him on a different 'account.'

The Court, however, (see ante, Vol. III. No. 346,) recalled this interlocutor, and remitted to the Lord Ordinary to receive from the defenders a condescendence of what they averred and offered to prove.

A condescendence was accordingly given in, which was followed by answers for Anderson; and from these, and the documents produced, the following circumstances appeared:—

Prior to the year 1772, old Rintoul had been a chapman or pedlar, but in that year he settled at Kincardine as a petty shopkeeper. In 1773 he married his first wife, (Mrs. Anderson's mother,) who died on the 23d of September 1776; and on the 27th of December thereafter a meeting of his creditors was held, at which he offered 'to make a surrender of his whole debts and

'effects in favour of his creditors, or to pay a composition of five 'shillings in the pound.' The composition was accepted on his debts, which amounted to £158 : 16 : 3,—his goods, and the debts due to him, amounting at the same period to only £38 : 7 : 10½. In 1778 Rintoul contracted a second marriage, and he died in 1822, leaving some property to be disposed of according to the provisions of his deed of settlement. It further appeared, that at the end of the ledger kept by Rintoul, in which he inserted his dealings with his ordinary customers, there was a leaf which contained entries of private transactions in his own hand; and among these were the two following:—

'1801, Dec. 1.—Cash given Andrew Anderson in part of his 'wife's patrimony, - - - £100 0 0

'1806, May 21.—To cash given Andrew Anderson 'in full of his wife's patrimony, - - £100 0 0'

This last payment was also entered in Rintoul's bank book, '1806, May 21. By order to Andrew Anderson, £100;' and it appeared from a certificate of the bank agent, that on that day an order to this amount had been paid by the bank.

Anderson did not allege that there had ever been any settlement or discharge of his wife's claim as her mother's executrix, and in these circumstances the defenders contended,

1. That there was sufficient evidence, independently of Anderson's admission, that £200 was paid to him during old Rintoul's lifetime, and that it fell on him, therefore, to show in the present action that there was a claim on the part of his wife to that amount, in extinction of which it might be applied; and,

2. That even supposing the admission to be the only evidence, the defenders were entitled to disprove the qualification attached to it, and had actually done so by the evidence produced, which led necessarily to the conclusion that old Rintoul was insolvent at the date of his first wife's death.

The Lord Ordinary reported the case, intimating his opinion in a note, that the entries in old Rintoul's books afforded no evidence of the payment, and that the admission by Anderson being the sole evidence of that payment, must either be taken in whole, or rejected in whole; but the Court unanimously sustained the defences, reserving to Anderson to establish any further claim.

LORD GLENLEE.—It appears to me that, to a certain extent at least, the doctrine on which Anderson founds does not apply; for, supposing this were an ordinary action for recovery of the second £100, how would the matter stand? We have an entry in the book by Rintoul that he gave Anderson £100; we have also an order entered in his bank book, and the evidence of the banker that that order

was paid. This is sufficient evidence of payment without any admission at all; so that, as to this £100, the plea that the qualification must be received does not apply. But besides, as to the general doctrine, this is very different from an oath on reference; the admission is merely a piece of evidence, and I am not even satisfied that the qualification is truly an intrinsic quality. If a qualification be as to something contracted at the constitution of the debt, though it result into a claim of compensation, yet if it entered into the original constitution of the debt, it will be an intrinsic qualification; but when the claim with which the admission is qualified does not arise at the moment of constitution, it will be extrinsic. Besides, Anderson does not say that there was any settlement of accounts, or any discharge, so that the matter is still open to an accounting, and old Rintoul's representatives are still entitled to say to him, you must enter into a count and reckoning, and if you have been overpaid, you must repay. If Anderson can show that his wife's claim for her mother's executry amounted to that sum, he will get off, otherwise he must collate before he can demand the legitim.

Lord Pitmilly.—I entirely concur. There is a great difference between this and an oath on reference, and the rule laid down by Phillips (p. 111) clearly applies. We must take the admission as it stands, but along with the rest of the evidence. I cannot agree with the Lord Ordinary that there is no proof of the payment except the admission. Old Rintoul's book is admissible, and it is important evidence, and altogether there is proof of payment independent of the admission. Then, if that be the case, it just comes to the question, Whether the £200 was in payment of the mother's executry, or of Mrs. Anderson's patrimony? And there cannot be stronger proof that there was no executry, than that, three months after his wife's death, Rintoul was insolvent, and only able to pay five shillings in the pound.

Lord Alloway.—Even if it had depended on the question whether the qualification was extrinsic or intrinsic, I would have held that it was extrinsic. But there is really no difficulty whatever when it is considered that there was no settled account, and that the qualification is completely disproved, as it is clear that there could have been no executry.

Lord Justice-Clerk.—I have nothing to add. The question is one on the whole evidence, which is altogether in favour of the defenders, unless the pursuer can instruct more satisfactorily than he has yet done, that this £200 was paid on another account.

Pursuer's Authority.—Campbell, Nov. 28. 1778, (9638.)

Macritchies, Bayley, and Henderson, W. S.—Top and Romanes, W. S.—Agents.

J. GEDDES, Pursuer.—*Forsyth.* No. 351.
J. HOPKIRK, Defender.—*Cuninghame—Hopkirk.*

acess—Partnership.—Held that where a debt is not constituted against a company, all the partners must be called in an action for constituting it against the partners.

June 2. 1827.

1st DIVISION. Lord Meadowbank. H.

IN 1785 a company was formed at Glasgow, consisting of ten partners, under the firm of the Glasgow Bottlework Company, of which Geddes was appointed manager, and of which he alleged that he was a partner. In the course of the following year a new company was formed under the firm of the Glasgow Glasswork Company, consisting chiefly of the same partners as those in the Bottlework Company; but it was alleged that there were also new partners. By one of the articles of the contract of the Glasswork Company, they bound themselves to implement and fulfil all the contracts of the Bottlework Company. Of this new company Geddes was also appointed manager, and had a small share as a partner. The concern was dissolved in 1792; and soon thereafter he brought an action against the company, concluding for certain alleged arrears of salary. This was met by a counter action, and a long litigation ensued. In the course of it, Geddes having claimed a certain sum as being due to him by the Bottlework Company as a partner, it was objected that he was bound to proceed against that company. He accordingly raised an action, in which he concluded that 'the said Glasgow Bottlework 'Company, and the said James Hopkirk, as cashier and sole sur-'viving partner of said company, as representing the same, and 'also as an individual,' ought and should be ordained to hold count and reckoning with him for his share of the profits.

In defence it was pleaded by Mr. Hopkirk, That the action could not be maintained against him as a partner of the company individually, till the claim was constituted against the company and the other individual partners, and therefore Geddes was bound to have called the whole other partners, or their representatives, according to the general rule, that all having interest must be brought into the field; and that as Geddes alleged that he himself was a partner, he must have known who his copartners were.

To this it was answered by Geddes, That he had called the company itself and Mr. Hopkirk, who was the surviving partner and cashier; and it had been decided in Scotland that it was sufficient to call the company itself,—and in England, that an action lay by a creditor of a company against any one partner, without calling the others.

The Court, on the report of the Lord Ordinary, 'sustained the 'preliminary defence, and sisted process till the first sederunt 'day in November next, so that all the parties may then be 'called,' and found Geddes liable in expenses.

The Judges held, that as the debt sued for was not constituted against the company, it was necessary to call all the partners; and that as Mr. Geddes alleged he was a partner, he could have no difficulty in knowing who his copartners were.

Pursuer's Authorities.—2. Bell, 619; Reid and M'Call, June 11. 1814, (F. C.); M'Tavish, Feb. 3. 1821, (F. C.); Kesley *v.* Codd, Dec. 23. 1826; Mandsley *v.* Le Blanc, Jan. 11. 1827.

Defender's Authorities.—Stair, 792; 4. Ersk. 1. 66; A. *v.* B. Feb. 26. 1741, (14560); Stevenson and Company, Feb. 14. 1757, (14667); Johnston, Jan. 20. 1824, (ante, Vol. III. No. 598.)

T. Syme, W. S.—J. G. Hopkirk, W. S.—Agents.

No. 352.

Rev. Dr. Davidson, Petitioner.—*Brown.*

T. Falconer, Respondent.—*D. of F. Moncreiff—Sandford.*

Process—Judicature Act—Stat. 6. Geo. IV. c. 120.—A party having brought forward a new plea after the record was closed, allowed to add it, but that only on payment of the whole previous expenses.

June 2. 1827.

1st Division. Lord Newton. D.

Dr. Davidson having presented a petition under the Bankrupt Act, praying to have Falconer, trustee on the sequestrated estates of his tenant Weir, ordained to make payment to him of a certain sum, for which he alleged he had a preference as landlord, and which he also alleged had been recognised by a transaction with a former trustee, and the case having been remitted to Lord Medwyn to prepare it, a record was made up and closed, and a judgment pronounced by his Lordship decerning against Falconer. The Court, however, recalled that interlocutor, and remitted to Lord Newton, before pronouncing judgment, to make certain inquiries, (see ante, Vol. V. No. 83.) His Lordship accordingly did so, and decerned against Falconer for a certain balance, on the ground that Dr. Davidson was a preferable creditor in virtue of his hypothec. Falconer again reclaimed, and for the first time pleaded, that as the rent was due for a lime-quarry, Dr. Davidson was not entitled to a preference.

To this plea it was objected, That as it was altogether new, it could not be listened to; and at all events the Court could not permit it to be added to the record, without finding Falconer liable in the whole previous expenses.

The Court, on condition of payment of the previous expenses, allowed the plea to be added to the record.

Scott, Finlay, and Balderston, W. S.—J. B. Watt—Agents.

A. HOPE and Others, Complainers.—*Sol.-Gen. Hope—Sandford.* No. 353.
MAGISTRATES of SELKIRK and Others, Respondents.—
D. of F. Moncreiff—Monteath.

Royal Burgh.—In a disputed election of the Deacon and Colleague of an Incorporation of a Royal Burgh,—Held that the votes of persons regularly qualified to be admitted freemen, and only for the first time admitted on the day of election, were not objectionable on the ground of temporary non-residence in the interval between the expiry of their apprenticeship and the date of admission.

June 2. 1827.
2D DIVISION.
M'K.

IN a complaint against the election of the Deacon and Colleague of the Hammermen of Selkirk at Michaelmas 1825, objections were, inter alia, taken to the votes of certain individuals on both sides, on the ground of non-residence, as to which there was no provision in the set; but in the seal of cause there was a declaration, that every freeman who should not reside should pay a certain sum quarterly. These persons, who were all masons or wrights, were either the sons of freemen, or had served the necessary apprenticeship in Selkirk, and had thereafter been in the habit of spending part of the year, generally the greater part of it, in Edinburgh, or other parts of the country, where wages were higher, and returning, for periods longer or shorter, according to circumstances, to Selkirk, where they resided with their parents or families, being in some instances married, and having houses in Selkirk; but two of these, who were unmarried, had left Selkirk on the expiry of their apprenticeship, and had resided constantly in Edinburgh for three or four years,—one of them, however, being in use to send his clothes to his friends in Selkirk to be washed. All the individuals whose votes were objected to on this ground had only claimed to be admitted freemen, for the first time, on the day when the disputed election took place; on which occasion they had come to Selkirk, and several of them left it immediately after the election, particularly the two last mentioned.

In these circumstances, it was pleaded on the one side, That residence was absolutely necessary to enable a freeman to exercise his privilege as a member of an incorporation; and reference was made to an unreported case of Dobson *v.* Inglis in 1803, as establishing that the same rule applied to persons claiming for the first time to be admitted freemen, as to those who had been previously admitted;—while, on the other hand, it was contended, That this only applied to persons already admitted freemen; but that, in regard to claimants for admission, residence was not a requisite qualification, and that, being otherwise qualified, parties

were entitled, on admission, to exercise their privilege, although, by subsequent non-residence, after becoming freemen, they might be precluded from doing so. And it was further maintained, that the circumstance of persons working as journeymen for a year or two in a different part of the country, where they might better perfect themselves in their trade, was not such a permanent change of residence as to disqualify them from voting when admitted freemen.

The Court repelled 'the objection of non-residence, as alleged, 'to the admission and votes' of the persons above mentioned.

LORD GLENLEE.—I understand that the only question before us at present is in regard to the objection of non-residence, and I am inclined to sustain the plea, that it is not a good objection in regard to persons just admitted. There might have been a difficulty, if the seal of cause had expressly required constant residence by freemen; but, on the contrary, I see that it contemplates non-residence, as it stipulates a certain payment by non-resident freemen, and consequently assumes that there may be such. At the same time there no doubt may be such a total abandonment of the burgh as might be sufficient to prevent a party from benefiting by this plea; but I cannot see that there is any such degree of non-residence condescended on upon either side as to disqualify the persons objected to from admission, and indeed none but what might be expected, considering the size of the burgh and the trade of these individuals. They may afterwards reside, and their previous non-residence, therefore, is not a good objection to the act of admission.

LORD PITMILLY.—I entirely concur.

LORD ALLOWAY.—I feel great difficulty here; but I am inclined to agree with Lord Glenlee as to those cases in which there appears to have been a bonâ fide intention to reside. By statutes, however, which have not been at all relaxed as to tradesmen, residence is required as a qualification for the exercise of any privilege; and I am not prepared to say that there is a general principle which makes residence unnecessary in the case of applicants. If such persons come one day, and go away the next, I doubt exceedingly whether they are entitled to exercise the privilege of freemen.

LORD JUSTICE-CLERK.—Considerable difficulty certainly attends this case, which involves an entirely new question; for the cases of Lamb and High were very different. There the parties whose votes were objected to, had been originally enrolled as members of their incorporations, and had afterwards entirely left the burgh, and then attended for the mere purpose of voting. To such cases as these, the objection of non-residence completely applies; but the question here is, whether it applies to persons admitted for the first time on the day of election, qualified in every other respect, and coming for the first time to avail themselves of the qualification for admission pre-

viously acquired? If the rule be laid down, that the working elsewhere between the expiry of the apprenticeship and the admission as a freeman is an objection to admission, it will amount to this, that tradesmen must not only serve an apprenticeship, but also work as journeymen in the burgh, and without leaving it, in order to qualify them for becoming freemen. A wright or a tailor may naturally wish to go to London to work as a journeyman, in order to perfect himself in his trade; but when he returns, can he be met with the objection that he is non-resident? I can see no principle for it; and as to the case of Dobson, although the objection was stated, there seems to have been no deliberate judgment on the general point, and the person there had been absent 20 years, which gave his coming to vote greatly the appearance of jobbing. Then, if the parties here were not barred from being admitted, I do not see how their votes, tendered on the very same day, should not be received.

LORD GLENLEE.—The finding of the Court should be confined to the case of non-residence, *as here alleged*; for it would not do to lay down a rule to exclude the objection in all kinds of non-residence.

Complainers' Authorities.—High, August 6. 1789, (1893); Lamb, July 29. 1789, (1889); Dobson *v.* Inglis, 1803, (not rep.)
Respondents' Authorities.—Anderson *v.* Wick, Feb. 17. 1749, (163); Dunbar, Jan. 7. 1757, (1855); Andrew, Jan. 24. 1775, (1883); Tennant, Feb. 23. 1785, (3720.)

J. YOUNG, S. S. C.—W. LANG, W. S.—Agents.

R. DAVIDSON, Pursuer.—*Cockburn—Maidment.*
Mrs. ROBERTSON, Defender.—*Jeffrey—Penney.*

No. 354.

Appeal—House of Lords—Jurisdiction.—Held incompetent to entertain an objection to the validity of a judgment of the House of Lords, that although it bore that the party had appeared and been heard, yet in point of fact he was dead.

June 5. 1827.
1st DIVISION.
Lord Medwyn.
S.

IN 1809, John Robertson, (the husband of the defender,) William Carlier, and Mason, Baird, and Company, entered into a joint adventure relative to a shipment of woollen cloths to Quebec. These cloths were purchased from George Lockwood and Company by Mason, Baird, and Company, on account of the joint concern, at the price of £1492: 14: 9. On the 22d of January 1810, Mason, Baird, and Company, who were the agents of Lockwood and Company, drew a bill, bearing to be for value in woollen cloths to Quebec, upon John Robertson and Company, (the firm said to have been assumed by the joint adventurers,) and which was accepted under that firm by Robertson. The bill was then indorsed in full to Lockwood and Company by Mason, Baird, and Company, who again indorsed it 'per procuration, 'George Lockwood and Company,' to Andrew Davidson, who

thereupon indorsed it to Robert Davidson. Thereafter, on 12th February 1810, another bill was drawn for precisely the same sum, and bearing to be for the same value, by Mason, Baird, and Company, and which was accepted under the firm of John Robertson and Company. This bill, it was alleged, was drawn by Baird as a partner of Mason, Baird, and Company, and also accepted by him under the firm of John Robertson and Company, as one of the joint adventurers. He then indorsed it under the firm of Mason, Baird, and Company, and sent it to Lockwood and Company.

When the first bill fell due, Davidson gave a charge on it to Robertson, as a partner of John Robertson and Company, —to Carlier in the same character,—and to Lockwood and Company as indorsers; and soon thereafter Lockwood and Company charged Robertson on the second bill. Robertson then brought a process of multiplepoinding, alleging that the bills had been granted for the same debt; and at the same time both he, Carlier, and Lockwood and Company presented separate bills of suspension of the charges given by Davidson. On the 29th November 1810, Lord Hermand found Robertson, as pursuer of the multiplepoinding, liable only in once and single payment, and ordained the competing parties (who were Davidson and Lockwood and Company) to produce their respective claims and interests in order to a competition, and at the same time he suspended the charge against Robertson in each case, 'ay and while the 'other bill be discharged;' and he also suspended the letters simpliciter as against Carlier and Lockwood and Company. Against this interlocutor Davidson represented on all the points; and thereafter, on the 28th of November 1811, the Lord Ordinary conjoined the whole of the processes of suspension with the multiplepoinding, and ordained Davidson to lodge a condescendence in regard to his allegation of Mason, Baird, and Company having authority to bind Lockwood and Company per procuration. Of this interlocutor (which necessarily recognised the multiplepoinding as a competent process) Davidson did not complain; and, on advising his condescendence with answers, the Lord Ordinary, on the 13th of June 1811, pronounced an interlocutor, which, after certain findings, proceeded in these terms:—'Finds that Lock-'wood and Company, though in use to employ Mason, Baird, 'and Company as commission agents in some of their sales, are 'not to be presumed to have intrusted them to draw or indorse 'bills in their name; while there is this peculiarity in indorsations 'bearing to be per procuration, that if they can at all convey the 'extraordinary privileges of onerous indorsation, the onus pro-'bandi of the existence of such procuration lies upon the indor-

'see: Finds no evidence of the existence of such procuration in 'this case: Suspends the letters simpliciter in the different sus-'pensions at the instance of Lockwood and Company, John Ro-'bertson, and William Carlier, of the charges at the instance 'of the representer, and decerns: With respect to the other 'bill, dated the 12th February 1810, fairly indorsed by Lock-'wood and Company, and now standing in their person by re-'indorsation, finds the letters and charge at their instance 'orderly proceeded as against the suspender John Robertson, 'and prefers them to the sum in medio of the multiplepoinding, 'and decerns in the preference, and for payment accordingly: In 'the suspension at the instance of William Carlier, who denies 'that he has any concern with John Robertson and Company, or 'can be bound by the subscription of that firm, before answer, 'allows George Lockwood and Company to give in a condescend-'ence, in terms of the Act of Sederunt, of the facts they will 'undertake to prove for showing that he is bound by such sub-'scription, if, in the circumstances of the case, they think it ne-'cessary to enter into that discussion.'

To this interlocutor the Court adhered on the 11th of December 1811, and 10th January 1812, and at the same time found Davidson liable in expenses.

Davidson then entered an appeal against the whole of the interlocutors, and Robertson then applied for interim execution, and obtained payment of £117: 15: 1 of expenses, for repetition of which he granted a bond in case of reversal. He died on the 11th of April 1815; but no notice of this was given to Davidson; and counsel and agent appeared for him in the House of Lords, where the cause was heard on the 19th and 21st of April 1815.

Thereafter, on the 4th of July, the House of Lords pronounced a judgment, which, after narrating the hearing of counsel upon the petition of Davidson, and the answer of the several parties, 'and also the answer of John Robertson, merchant in Aberdeen, 'put in to the said appeal, and that due consideration had been 'had of what was offered on either side in this cause,' proceeded in these terms:—'And it appearing to the Lords that the ap-'pellant has not appealed from or reclaimed against the inter-'locutor of the Lord Ordinary of the 29th November 1810, in 'the process of multiplepoinding, finding the pursuer liable only 'in once and single payment, or from the interlocutor of the Lord 'Ordinary, of the 28th of February 1811, conjoining the pro-'cesses of suspension with the multiplepoinding; and that the 'appellant, on the contrary, in his reclaiming petition against the 'interlocutor of the Lord Ordinary of the 18th June 1811, sub-'mitted to the proceeding in the multiplepoinding, the Lords

'cannot proceed to determine whether the process of multiple-
'poinding was well raised or not; but, on the bill of suspension
'of William Carlier, it is ordered and adjudged by the Lords
'Spiritual and Temporal, in Parliament assembled, That the
'several interlocutors complained of in the said appeal, so far as
'they sustain the said bill of suspension of the said William Car-
'lier, be, and the same are hereby reversed: And, with respect to
'the bills of suspension of John Robertson, and of George Lock-
'wood and Company, as conjoined with the process of multiple-
'poinding, it is further ordered and adjudged, That the several
'interlocutors complained of in the said appeal be, and the same
'are hereby reversed; and it is ordered, That the cause be re-
'mitted back to the Court of Session in Scotland, to receive such
'evidence as may be properly offered with respect to the two
'bills of exchange in question; and particularly to receive evi-
'dence upon the facts stated in the appellant's condescendence,
'and in the answer of the respondents George Lockwood and
'Company thereto, as to the nature of the dealing of the respond-
'ents George Lockwood and Company with Mason, Baird, and
'Company, and the authority which Mason, Baird, and Company
'had to indorse the bill of exchange of the 22d January 1810,
'as by procuration for the respondents George Lockwood and
'Company, so as to make the said respondents liable to the pay-
'ment, as indorsers of the said bill; or in any manner to transfer
'such bill to Andrew Davidson, notwithstanding the indorsement
'by Mason, Baird, and Company in favour of the respondents
'George Lockwood and Company, either by striking out the said
'indorsement in favour of the respondents George Lockwood and
'Company, or otherwise, without making the said respondents
'George Lockwood and Company liable as indorsers of the said
'bill.'

The case having then returned to the Court of Session, the trustee on the estate of Mason, Baird, and Company, (who had become bankrupt,) raised a reduction of the title of Davidson to the bill; and having been successful, the Court of Session found it unnecessary to proceed in the remit, and refused Davidson repetition of expenses. He then entered another appeal to the House of Lords, when their Lordships, on the 15th of June 1824, pronounced this judgment:—'Find that the Court of Session ought
'to have applied the judgment of this House in the terms there-
'of; and as by that judgment the interlocutor of the 10th Janu-
'ary 1812 was, with other interlocutors, reversed, the appellant,
'upon the cause being remitted to the Court of Session accord-
'ing to the said judgment, was entitled to a repetition of the costs
'paid by him in pursuance of that interlocutor: It is therefore

'ordered and adjudged, That the interlocutors complained of in 'the present appeal be, and the same are hereby reversed: And 'it is further ordered, That the cause be remitted back to the 'Court of Session in Scotland, to proceed therein according to 'the judgment of this House pronounced on the 4th of July '1815.'

This judgment having been applied in terminis by the Court, and the case remitted to the Lord Ordinary to proceed in it quoad ultra, a motion was made by Davidson for repetition of the expenses paid to Robertson. To this it was objected that Robertson was dead, and that his representatives had not been called. Davidson thereupon raised a summons of transference against the defender Mrs. Robertson, as representing her husband, in which he obtained decree of transference in statu quo on the 22d of January 1825.

The motion for repetition was then made against her, but she resisted it on the grounds,

1. That as the judgment of the House of Lords had been pronounced at a time when her husband was dead, it was inept, and consequently could receive no effect; and,

2. That as Robertson had no interest in the matter, except to pay safely, and as he had been found liable only in once and single payment, and the House of Lords had decided that they could not touch that interlocutor, there had been no reversal so far as his interest was concerned, and that the reversal had merely taken place in the question of preference as between Davidson and Lockwood and Company, and therefore there were no termini habiles for repetition.

To this it was answered,

1. That the Court of Session had no jurisdiction to inquire whether the judgment of the House of Lords was effectual or not, on the ground of Robertson having been dead when it was pronounced; that if that was a valid objection, it could only be given effect to by the House of Lords; but that the Court of Session could do nothing else than obey that which was ex facie a good and formal judgment; and,

2. That Robertson was not only the raiser of the multiplepoinding, but was also a suspender; that this Court had suspended the letters simpliciter, and awarded expenses to him, but the House of Lords had reversed that judgment, and consequently the condition of the bond had come into existence, under which Davidson was entitled to repetition of the expenses.

The Lord Ordinary having reported the case on informations, the Court appointed the following questions to be laid before the other Judges for their opinions:—

'1. Whether it is competent for this Court to entertain the objection stated by the defender Mrs. Robertson to the application, as sought against her, of the judgment pronounced by the House of Lords, on the 4th of July 1815, in the appeal to which her husband, whom she represents, had been a party,—that her said husband was dead before the date of the hearing on which the said judgment proceeded,—and that she was not at any time made a party to the proceedings in the House of Lords?

'2. Supposing this objection competent, and the averments on which it proceeds properly established,—what effect ought to be given to the objection?'

On advising the opinions of the Judges, together with the informations, the Court repelled the objection, decerned for repetition, and found Mrs. Robertson liable in expenses.

Lords Justice-Clerk, Glenlee, Pitmilly, Alloway, Cringletie, Meadowbank, Mackenzie, and Eldin, delivered this opinion:—We have considered the informations and questions submitted to us by the Judges of the First Division in the case of R. Davidson, late farmer at Leyton, against Mrs. Robertson; and, in answer to the first question we are of opinion, That it is not competent for this Court to entertain the objection stated by the defender Mrs. Robertson to the application, as sought against her, of the judgment pronounced by the House of Lords on the 4th of July 1815. As that judgment stands, it cannot be determined by this Court what effect is due to the objection stated by the defender, that her husband was actually dead before the date of the hearing on which said judgment proceeded, and that she herself had not been regularly made a party to the proceedings in the House of Lords, as we are very clearly of opinion, that it is the province of the House of Lords alone to decide on all objections of that nature.

The above being our opinion on the first question, it is unnecessary to notice the second query submitted to us.

Lord Medwyn delivered this opinion:—No person can doubt that it is incompetent for this Court to inquire into the circumstances under which a judgment of the House of Lords has been pronounced. The duty of the Court whose judgment has been appealed from, is implicitly to obey and apply the judgment. But the present case does not present itself in this simple form. The petitioner Davidson does not come before us with a judgment of the House of Lords in his hands, which he can ask of us immediately to apply; for finding that at the time the judgment was applied, on 25th June 1824, one of the parties, John Robertson, was dead, and that his representatives had not been called into Court, he has availed himself of the form competent for such a situation, by bringing an action of transference against these representatives; and in this process decree is

pronounced on 22d January 1825, transferring the action, according to the usual style, in statu quo, 'that the suit may proceed in the 'state it was in when the party against whom it depended died.' The foundation of the petitioner's summons in this accessorial action is, that Robertson died before the process was brought to a close; and this necessarily called forth the inquiry, when this event happened. It appears that he died on 11th April 1815. In quo statu was the original action at that time? It then stood on a decree of this Court, appealed from. The process was no longer in this Court, but in the House of Lords; and I do not see how we can proceed to pronounce any judgment in a cause which, at the petitioner's instance, has been transferred against the present parties, as on 11th April 1815, at which period there was a decree of this Court appealed from, but not reversed.

If, after a party is dead, an interlocutor had been pronounced in this Court in ignorance of that event, such interlocutor would be null and void; Shiar against Killiehuntly, 9th July 1765, in Supplement to Dictionary, Vol. V. p. 911. Whether it be so or not in the House of Lords, I do not pretend to inquire, as I am now clearly of opinion that we have no power to institute any such inquiry. We do all, I think, that we have it in our power to do, when, at the petitioner's instance, we transfer the process against Robertson's representatives in statu quo; for, as at the time of Robertson's death it was in the House of Lords, without any judgment having been pronounced, we can proceed no further, as we must not interfere with any cause while in that House. So that it appears to me the House of Lords alone can proceed further in the action in a question with Robertson's representatives, and do justice between the parties in the appeal.

Lord Balgray.—There were two processes brought by Robertson,—first a multiplepoinding, and then a suspension. In the multiplepoinding the usual interlocutor was pronounced, which the House of Lords found they could not competently review; but in the suspension there was a separate and distinct judgment suspending the letters simpliciter, which has been reversed. That being the case, the expenses must be repaid.

The other Judges concurred with Lord Balgray.

Pursuer's Authorities.—Hamilton, March 21. 1813, (F. C.); Miller, May 31. 1821, (ante, Vol. I. No. 46); Ballantine, Dec. 7. 1676, (348); Sidney's Treatise on Appeals, 32.

C. F. Davidson, W. S.—Morison and Burnett, W. S.—Agents.

No. 355.

J. M'GHIE, Pursuer.—*Skene—W. Bell.*
T. LEISHMAN, Defender.—*D. of F. Moncreiff—Greenshields.*

Sasine—Heritable Bond.—Circumstances under which various alleged irregularities committed in framing an heritable bond and sasine were repelled.

June 5. 1827.

1ST DIVISION. Lords Medwyn and Newton. S.

ON the 15th of March 1810, John Currie, vintner in Hamilton, granted an heritable bond for £750 to M'Ghie over certain subjects situated in the parish of Hamilton and county of Lanark. On the 15th of April 1811 he granted another heritable bond over the same subjects for £300 to Leishman, on which sasine was taken and recorded on the same day. M'Ghie did not take sasine upon his bond till the 17th of June thereafter. In 1814 Currie was required by M'Ghie to pay his bond; and having failed to do this, M'Ghie exposed them to public roup in virtue of his bond, and purchased part of them at £390. A disposition was thereafter granted to him by Currie, on which he was infeft on the 1st of March 1816. Having taken possession, and an action of mails and duties having been brought against him by Leishman, M'Ghie brought a reduction of Leishman's bond and sasine. By that bond, Currie, after acknowledging payment of the £300, bound himself to repay that sum, 'with £40 sterling of liquidate 'penalty in case of failure, and the due and ordinary annual rent 'at the rate of 5 per cent. of the said principal sum, from the 'date hereof to the said term of payment,' &c. He then bound and obliged himself 'to infeft and seise the said Thomas Leish-'man and his foresaids, not only in all and whole an annual rent 'of £15 sterling, or such an annual rent, less or more, as, by the 'laws regulating annual rents for the time, shall effeir and cor-'respond to the foresaid principal sum of £300 sterling yearly, 'to be uplifted and taken at the said two terms, beginning the 'first term's payment at the term of Whitsunday first for what 'annual rents will be then due, and the next term's payment at 'the term of Martinmas thereafter, and so forth at the said two 'terms in the year, during the not redemption, furth of all and 'hail,' &c.; 'and that by two several infeftments and manners of 'holding, the one thereof to be holden of me and my heirs in free 'blench, for the payment of a penny Scots money upon the ground 'of the said subjects at the term of Whitsunday yearly; and 'the other of the said infeftments to be holden of me and my 'foresaids *of* my immediate lawful superiors thereof, in so far as 'concerns the said subjects, and that either by resignation or 'confirmation, as best shall please the said Thomas Leishman and 'his foresaids, the occupation of one of the said infeftments being

'no ways prejudicial to the other;—which infeftments, and either 'of them, annual rent subjects, and others above written, out of 'which the same is upliftable, I bind and oblige me and my fore-'saids to warrant, acquit, and defend to the said Thomas Leish-'man and his foresaids, at all hands, and against all deadly, as 'law will.' By the precept of sasine he appointed his procurator to 'give and deliver heritable state and sasine, with real, ac-'tual, and corporal possession, to the said Thomas Leishman and 'his foresaids, not only of all and haill the foresaid annual rent of '£15 sterling, or such an annual rent, less or more, as, by the 'laws regulating annual rents for the time, does or shall effeir 'and correspond to the foresaid principal sum of £300 sterling 'yearly, to be uplifted and taken at the foresaid two terms in the 'year, Whitsunday and Martinmas thereafter, at said two terms, 'during the non-redemption thereof, furth of all and haill the 'subjects particularly before mentioned, with the pertinents, lying, 'bounded, and possessed in manner before described, or furth of 'any part or portion thereof, rents, profits, or duties of the same; 'but also of all and haill the said houses before mentioned, with 'the pertinents themselves, for and in real security of the pay-'ment to the said Thomas Leishman and his foresaids of the fore-'said sum of £300 sterling of principal, and £40 sterling of liqui-'dated penalty.' In the instrument of sasine it was stated that the attorney appeared, 'having, and in his hands holding, an 'heritable bond and disposition in security, of the date under-'written, containing therein the precept of sasine hereafter in-'sert, made and granted by John Currie, vintner at the Hamil-'ton Arms Inn, Hamilton, whereby, and for the causes therein 'specified, he bound and obliged himself, and his heirs, executors, 'and successors whatsomever, to content and repay the principal 'sum of £300 sterling to the said Thomas Leishman,' &c. After reciting the precept of sasine, it was stated, that 'the said John 'Taylor, bailie foresaid, by virtue thereof, and of his office of 'bailiary thereby committed to him, gave and delivered heritable 'state and sasine, with actual, real, and corporal possession of all 'and haill the foresaid houses, all lying bounded and described 'as aforesaid, and herein held as repeated brevitatis causâ, in real 'security, and for payment of the foresaid sums of money, prin-'cipal, annual rents, liquidate expenses, and termly failures, if 'incurred; but redeemable always, and under reversion, in man-'ner above mentioned, and that by delivering to the said John 'Johnstone, as attorney for the said Thomas Leishman, of earth 'and stone of and upon the ground of the said houses, and a 'penny money for the said annual rent, as use is; whereupon,

'and upon all and sundry the premises, the said John Johnstone, 'as attorney foresaid, asked and took instruments in the hands 'of me, notary public;' and the instrument concluded by mentioning that 'the witnesses were specially called and required by 'me (the notary) to the premises.' In the docquet, the words 'instrumentum,' 'super,' and 'præmissorum' were omitted, and instead of 'prænominatis testibus,' the words were 'prænmintis 'testibus;' 'disi' was written for 'dici;' and it was stated that the instrument (which consisted of one sheet) was written upon three pages, whereas, in point of fact, it was written on four.

Founding on these inaccuracies, M'Ghie contended,

1. That as the obligation in the bond was to pay the principal sum of £300, with interest, whereas the obligation to infeft was in an annual rent of £15 sterling, and as the holding was utterly irregular, the bond was ineffectual as the foundation of a security for the principal sum.

2. That the sasine was also inept, in respect that it proceeded on an heritable bond and disposition in security, whereas the deed was simply an heritable bond; that although the precept ordained sasine to be given of an annual rent, yet infeftment had been taken in security of the principal sum itself; that it did not appear in whose favour that sasine had been given; and that the witnesses had been called by the notary, which he ought not to have done, as he should be a passive spectator; and,

3. That the docquet was irregular, and stated what was not true.

To this it was answered,

1. That there was an obligation to infeft, not merely in the annual rent, but in the subjects themselves; and that the objection to the holding rested merely on the circumstance of the word *of* having been written in place of *off* or from.

2. That the deed was truly an heritable bond and disposition in security; that the obligation to infeft was not merely in an annual rent, but in the subjects themselves, of which accordingly infeftment had been given to the attorney of Leishman, by delivering to him the proper symbols; and that the circumstance of the notary having called the witnesses could not affect the validity of the deed; and,

3. That the docquet expressed all that was essential to be stated; and the rule was settled, that mala grammatica non vitiat cartam.

The Court, on the report of the Lord Ordinary, repelled the reasons of reduction, and assoilzied the defender.

LORD BALGRAY.—The objections are so numerous, that I was at first somewhat puzzled with them; but, on looking at the deed itself, I

am perfectly satisfied, that although it might have been more correctly drawn, yet it is a valid security. The obligation to infeft is not only in an annual rent, but in the subjects themselves. The objection to the holding is a great deal too critical. In truth, it depends upon the omission of the letter *f*. In the instrument of sasine the title is clearly deduced in terms of the act of Parliament, and infeftment is given not only in the annual rent, but in the subjects themselves. I was a good deal staggered by the objection, that delivery had not been given to the party himself, but to the attorney. The Court, however, has found that delivery to the attorney is sufficient.

The other Judges concurred.

Pursuer's Authorities.—2. Ross, 198; 1. Jurid. St. 305; 2. Bell's St. 217; Kirkham, May 21. 1822, (ante, Vol. I. No. 480); M'Gillivray, Dec. 9. 1824, (ante, Vol. III. No. 271); M'Intosh, Nov. 17. 1825, (ante, Vol. IV. No. 163); Bell on Purch. Title, 192; A. S. Jan. 17. 1756.

Defender's Authorities.—Robertson, Jan. 7. 1742, (16955); Clark, Feb. 7. 1752, (No. 1. App. Sasine); M'Donald, Feb. 14. 1778, (16942.)

ANDERSON and WHITEHEAD, W. S.—C. BALFOUR, W. S.—Agents.

No. 356.

J. SHAW and Others, Pursuers.—*Cuninghame.*
W. FORBES, Esq. and Others, Defenders.—*D. of F. Moncreiff—Maconochie—Alison.*

Parish Church—Heritors.—Circumstances under which an heritor who had paid his share of the assessment for rebuilding a parish church, was found liable in a share of the expenses and interest arising on bills granted and repeatedly renewed by a committee of the heritors for a deficiency occasioned by several heritors having failed to pay their shares.

June 5. 1827.

1ST DIVISION. Lord Eldin. D.

A dispute having arisen among the heritors of the parish of Falkirk relative to the rebuilding of the church, a decree was pronounced by the Presbytery, appointing it to be immediately rebuilt. Of this a suspension was brought by Mr. Forbes of Callendar, in which the Lord Ordinary, after a great deal of litigation, approved of a report by Mr. Gillespie, architect, and appointed 'the whole heritors of the parish of Falkirk to hold a 'meeting within the parish church to choose a collector, adver-'tise for contractors, and take the other steps necessary for carry-'ing the work into execution.' A meeting was accordingly held, at which a person attended on behalf of Mr. Forbes, who, while he concurred in the nomination of a collector, required that, before entering into any contract, the necessary funds should be raised, and lodged in bank. This, however, was not acceded to; and a committee of heritors was appointed, who were directed by the Lord Ordinary and the Court 'forthwith to advertise

'for contractors, and take the other steps necessary for carrying 'the work into execution.' Some delay having occurred, the Court was again applied to, and authority was granted to them forthwith 'to enter into a contract, with power to them to assess the heri-'tors of the parish of Falkirk' for this purpose; failing which, this was to be done by the Presbytery of the bounds. A contract was in consequence entered into by the committee with builders, by which the price of the church was to be £3593, and which the committee bound themselves to pay in certain instalments. The collector then proceeded to levy the money necessary for payment of the price, and also for certain extra work, of which Mr. Forbes paid his share. Several of the other heritors having, however, failed to do so, and the collector having neglected to obtain payment from others, a deficiency of funds arose; and although actions were in some instances raised by the collector against them, yet ultimate diligence had not been done against any of them. On the termination of the work, the committee, consisting of the pursuers, were obliged to grant two separate bills to the builders, —the one for £793 : 2 : 6, and the other for £453 : 6 : 3,—both of which were discounted with the Falkirk Bank. These bills were afterwards renewed by a bill being granted to the Bank by the committee for £802 : 11 : 1; and, after repeated renewals, there remained a balance of £416, for which they granted their bill. The greater part of this sum consisted of accumulated interest, and the expense of renewing the bills. Thereafter the pursuers brought the present action against the representatives of Mr. Forbes for payment of £119, as his share of the above balance of £416.

In defence they maintained, That as Mr. Forbes had paid his share, he could not be liable for the arrears due by others, and still less for the expenses of carrying on a system of renewing bills, and this the more especially where the collector, who was under the directions of the pursuers, had neglected to take effectual means for recovering the arrears.

To this it was answered, That the pursuers were acting gratuitously for behoof of all concerned; that the collector was nominated by the heritors at large, including Mr. Forbes; that they had been compelled to interpose their personal obligation, and to raise money by means of bills, and the deficiency which existed must be divided among all who were able to pay, according to the respective rates of their liability.

The Lord Ordinary decerned in terms of the libel, and the Court, by a majority, adhered.

LORD PRESIDENT.—Mr. Forbes was a party to the appointment of a collector, and at all events he homologated his appointment; and if the collector has neglected to do his duty, Mr. Forbes was as much answerable for the consequences as the pursuers.

LORD BALGRAY.—This was a sort of joint concern. A contract was made by the heritors with builders, through the intervention of a committee; but although the committee were bound in the first instance to the builders, yet each heritor was liable; and those who paid the price to the builders were entitled to relief from the other heritors, to the effect of being indemnified for what expenses they incurred beyond their own proper shares.

LORD GILLIES.—The heritors were liable singuli in solidum; and it certainly cannot be maintained that the committee are to bear the burden of any deficiency of funds which might arise.

LORD CRAIGIE.—This appears to be a question of very general importance; and in order to decide it, we must look carefully into the state of the law with regard to the rebuilding or repairing of churches. It may seem harsh in the defenders to insist that the interest arising from the arrears due on account of the building of the church of Falkirk should fall upon the poorer heritors, or upon the collector or committee of management, from whose delay the accumulation of interest arose.

But the question, as it appears to me, must here be decided by the same rule and principle as if the forbearance had been shown to the most extensive proprietor in the parish, and as if, by his unwillingness or inability to pay, interest had been allowed to accumulate upon his proportion of the expense, and bills discounted a dozen of years on that account. Before the enactment in 1563, the rebuilding and repairing of churches was a burden upon the tithes, and upon those who had right to the titulary, whether lay or clerical; and it is not easy to discover why this was not continued after the Reformation, so far as there was a sufficiency of tithes for that purpose, after a necessary allowance had been set apart for the minister of the parish. But the burden in all cases was laid upon the heritors by the act 1563. And by the subsequent enactment in 1572, after the necessity of building a church was ascertained, the heritors, or, on their failure, the Ecclesiastical authorities—that is, the dignified clergy or the superintendant, whose powers were afterwards devolved upon the Presbytery—were to assess the heritors for the sums necessary; and this assessment might be enforced by a charge of horning. It is not said according to what standard the assessment was to be levied from the different heritors, and it might be either by the valued or real rent; but it is quite clear that no general liability was established, each heritor being liable for his own share, and no more; and as the area of the church was divided in the same manner, this was perfectly just, while, if the assessment was recovered, as it ought to be, as soon as it was due, no loss could arise. It follows

from this, that where an arrear is incurred, it must be made effectual against each heritor according to the valuation, either by the real or valued rent, as the case may be; and so far as any heritor has paid his proportion when required to do so, he cannot be subjected for payment of the arrears due by others, and least of all for interest upon arrears, and interest upon that interest, as accumulated by a series of discounts of bills granted by the committee of management, or by the collector appointed by them. In this case it appears that the late Mr. Forbes not only paid the sums assessed upon his property as soon as required to do so, but he called upon the committee of management and collectors to lose no time in recovering the arrears. In a question, therefore, with these parties, the representatives of Mr. Forbes have now a just and legal defence. Indeed, if the question had arisen between the contractors and him after they had it in their power to recover the money from the proper debtors, I do not see how Mr. Forbes or his representatives could be required to pay what never was due by him, and what, with due attention, might have been levied from the proper debtors.

J. Baird, W. S.—W. Forbes, W. S.—Agents.

No. 357. Gillespie, Wright, and Company, Suspenders.—*Wilson.*
Walkinshaw, Dow, and Cooper, Chargers.—*Skene.*

June 5. 1827.
2d Division.
Bill-Chamber.
Lord Newton.
M'K.

Lord Ordinary refused a bill of suspension of a charge on a bill of exchange. Court adhered.

J. Stuart, S. S. C.—J. Smyth, W. S.—Agents.

No. 358. A. Speirs, Advocator.—*Cuninghame—Speirs.*
Ardrossan Canal Company.—*D. of F. Moncreiff—Jardine.*

Sale—Interest—Statute.—Found,—1.—That an offer of a price for lands necessarily includes an offer of interest on the price from the date of possession; —and,—2.—That under a local act authorizing a compulsory sale of lands to be valued by a Jury, if the proprietor should not accept the sum offered as price and for damages, and declaring that the expense of the trial should be borne by the proprietor or the other party, according as the offer was greater or less than the price and damage found by the Jury, the offer and the verdict not being capable of comparison, the provisions of the statute do not apply.

June 5. 1827.
2d Division.
Lord Pitmilly.
F.

By an act for making a canal from Ardrossan in the county of Ayr to Glasgow, the company of proprietors are authorized to take such lands as might be necessary, making satisfaction to the owner; and it is provided, that if the parties 'cannot agree as to 'the amount or value of such satisfaction, the same shall be as-'certained and settled by the verdict of a Jury, to be summoned

'and chosen by the Sheriff of the county in which such lands, '&c. are situated.' It is further directed that the Jury thus chosen 'shall inquire of, assess, and ascertain the sum or sums of 'money to be paid for the purchase of such lands, tenements, or 'other heritages, or the recompence to be made for the damages 'that shall or may be sustained as aforesaid, and shall assess 'separate damages for the same;' and it is provided, 'that in each 'and every case where a verdict shall be given for more money, 'or for a greater annual rent, as a recompence or satisfaction for 'the absolute sale of any lands, &c., or as a compensation for any 'damages done or to be done to such lands, &c., than had been 'previously offered by or on behalf of the said company of pro-'prietors,—all the expenses of summoning such Jury, and taking 'such verdict, shall be settled by the said Sheriff, and defrayed by 'the said company of proprietors; but if any verdict shall be given 'for the same sum or rent that had been previously offered by or 'on behalf of the said company of proprietors, or for a less sum 'than had been so previously offered, or in case no damages shall 'be given by the verdict, where the dispute is for damages only,'— 'the costs and expenses of summoning and taking such verdict 'shall be settled in like manner by the said Sheriff, and be borne 'and paid by the person or persons with whom the said company 'of proprietors shall have such concerns.'

In virtue of this statute, the Ardrossan Canal Company, in the year 1807, took possession of the lands belonging to the advocator Speirs, offering him, as a compensation for the ground to be occupied by them, £70 per acre. This offer Speirs refused; and, after various unsuccessful efforts to come to an arrangement, the company in 1813 made a second offer at the rate of '£5. 10s. per acre yearly, or £110 in full of value of ground 'and damages.' This Speirs likewise declined, and in 1814 he presented an application to the Sheriff, praying him to impannel a Jury to assess the value of the ground and the damages. The Sheriff having pronounced an interlocutor, remitting this claim to the knowledge of an assize, the company gave in a petition to explain their offer by a statement of the mode of measurement acted on in their settlement with proprietors, which was as follows:— 'That the canal or towing-path, the fence on the outside thereof, 'and one yard of ground along the opposite bank of the canal, is 'the whole extent of property desired to be occupied and paid for 'by the Canal Company at the said rate of £110 per acre. But, 'over and above this, the Canal Company propose and agree to 'pay to Mr. Speirs, as they have done to other proprietors, half 'price, at the said rate of £110 sterling, for the sloping banks of

'the canal, where they cannot be ploughed,—such sloping banks 'to remain the property of Mr. Speirs, the heritor.'

A Jury was thereafter impannelled, who found that the several lands through which the canal passed were worth certain specified sums per acre, 'according as the whole of the said lands shall 'be found to measure; that the outside sloping banks be retained 'by the proprietor, and paid for by the Canal Company at the 'rate of £60 per acre;' and that Speirs was entitled to £80 in full compensation of all damages, and to interest 'on these prices 'and sum from the dates of the actual possession of land; but de-'ducting therefrom whatever sums may have been paid by the 'Canal Company to the tenants or others for the ground actually 'occupied by the canal, its banks and towing-path, since the same 'were taken possession of.' The ground taken possession of by the company was subsequently measured under a remit from the Sheriff, and the price calculated according to the rates found by the Jury, and the Sheriff gave judgment for the sum so determined, which amounted to £887, with interest from the dates of possession; and the question then arose, whether this sum exceeded or fell short of the offer made by the company, on which depended the point by which party the expenses were to be paid. The Sheriff calculated that, according to the offer, the sum which would have been given to Speirs would amount to about £901, and held that interest must be understood to have been included in the offer; and he accordingly found that the expenses must be borne by Speirs, who thereon brought an advocation, in which the only question argued was, whether the offer or the award of the Jury was the greater. This was at first considered to depend on whether interest from the date of possession must be held to have been included, though not expressed, in the company's offer; and the Lord Ordinary concurring on this ground with the Sheriff, that interest must be understood in every offer of a price for land from the date of possession, remitted simpliciter.

Speirs having then reclaimed, the Court at first adhered to, and afterwards altered the Lord Ordinary's interlocutor; but having again returned to it, Speirs once more reclaimed, and insisted on several other points, and, inter alia, That the company having made a tender which could not properly be contrasted with the verdict which the act required the Jury to return, must be liable for the expenses in consequence of their neglect of the provisions of the statute; and he objected to the measurement of the slopes on which the Sheriff had calculated the value of the offer, and to the slopes included in that measurement. The Court thereupon remitted to a surveyor to measure and report. The surveyor re-

turned a voluminous report, proceeding on eight several views of the meaning of the company's tender, in regard to four of which the measurement and valuation was in favour of the company, while, as to the other four, it was in favour of Speirs. On considering this, the Court recommended the cause to be settled by reference, and delayed procedure for some time for that purpose; but the parties not having adopted this recommendation, their Lordships ultimately pronounced this interlocutor:—'In 'respect that the offer in this case cannot properly be compared 'with the verdict, find that the provisions of the statute as to the 'expenses of the trial before the Sheriff cannot apply, and that 'each party must bear their own expenses of that trial, without 'relief from the other;' and with this finding they adhered to their former judgment, adhering to the Lord Ordinary's interlocutor, and found no expenses in this Court due to either party.

J. KER, W. S.—W. PATRICK, W. S.—Agents.

COMMISSIONERS of SUPPLY of WIGTONSHIRE, Pursuers.—*Greenshields.*
OFFICERS of STATE, Defenders.—*Sol.-Gen. Hope—Dundas.*
MAGISTRATES of WIGTON, Defenders.

No. 359.

Criminal and Lunatic Pauper.—A pauper having been tried for certain acts of theft before the Court of Justiciary on the indictment of the Crown, and a verdict having been returned finding him guilty, but that he was subject to fits of insanity at the time of committing the acts charged, on which verdict the Court ordained him to be confined in the jail of the head burgh of the county where the crime was committed—Held that the burden of maintaining him in jail, and afterwards in a lunatic asylum, till liberated on a remission, must be borne by the Crown, and not by the county where the acts were perpetrated, nor the burgh of imprisonment, nor the parish of his settlement.

June 5. 1827.

2D DIVISION. Ld. Cringletie. M'K.

JAMES FISHER was tried on indictment by the Crown, before the Circuit Court of Justiciary at Ayr, for certain acts of theft committed within the county of Wigton, and a verdict was returned, finding 'the pannel guilty, but that he was subject to 'fits of insanity at the time of committing the theft.' The Court, on this verdict, pronounced a judgment, ordering him to be 'transmitted to the tolbooth of Wigton, therein to remain during 'the remaining days of his life, unless his friends shall find sufficient caution, to the satisfaction of the Sheriff of the county, to 'take the custody of his person, and keep him in such security 'as that he may not have it in his power to commit such crimes 'and irregularities in time coming.' Fisher being a pauper, the county of Wigton advanced the sums necessary for his mainte-

nance in jail, and in the lunatic asylum of Glasgow, to which he was removed by warrant of the High Court of Justiciary, on a joint application by the county and the Magistrates of Wigton. He remained in the lunatic asylum for four years, when he was liberated in virtue of a remission from the Crown. The county then raised this action of relief against the parish of St. Quivox, as the place of Fisher's birth, and those of Sorn and Ochiltree, as parishes where he had obtained a legal settlement, concluding for payment, from one or other of them, of the sums advanced for his maintenance and removal to the Lunatic Asylum. The cause having come before Lord Pitmilly as Ordinary, his Lordship pronounced this interlocutor:—'In respect the libel concludes against the defenders for payment of certain sums of money disbursed by the pursuers, and for relief of certain obligations undertaken by them to the lunatic James Fisher, an alleged pauper, in consequence of a sentence of imprisonment for life pronounced against him by the Court of Justiciary, on a verdict finding him guilty of a certain theft, but adding that he was subject to fits of insanity at the time of committing the theft; and in respect there is no rule of law, or any precedent, for subjecting the parish of a poor man's settlement to relieve the party on whom the burden falls of alimenting him, in the circumstances and in the manner occurring in this case; and further, in respect the libel concludes against the parishes which are called as defenders,—not that these parishes, or any one or other of them shall be decerned in general to aliment the pauper, and that the quantity of aliment shall be fixed in the usual and legal manner, but concludes for certain specific sums,—viz. for £35:5:1 in name of aliment during a certain named period, and for £13:18:4 as the expense of legal proceedings, and of removing him to the lunatic asylum, and to relieve the pursuers of the obligation undertaken for his maintenance in the asylum, or otherwise to pay £50 sterling for the aliment of the pauper during his life; sustains the defences, assoilzies the defenders, and decerns.'

Against this interlocutor the Commissioners of Supply gave in a petition; but the Court, after contradictory judgments, adhered. Thereupon the Commissioners of Supply reclaimed, and at the same time raised supplementary actions against the Officers of State and the Magistrates of Wigton, as parties liable to relieve them of their advances.

Informations by all the parties now in the field having been ordered, it was contended for the Commissioners of Supply,

That although, from feelings of humanity, they had advanced

the sums necessary for the support of this unfortunate criminal lunatic, they were confessedly not bound to do so, counties being subject only to the burden of maintaining prisoners preparatory to trial, and that in this case the burden must necessarily fall on the parish of Fisher's settlement, on the Crown, or the Magistrates of the burgh of Wigton, where he was sentenced to be confined; and they argued,

1. As to the Parishes—That in the case of Scott *v.* Thomson, where a pauper lunatic was apprehended and confined for public security on the application of the procurator-fiscal of a county, it had been decided that the parish where he had haunted, and had been apprehended, was liable for his maintenance in the first instance till that of his settlement should be discovered; and that, on the same principle, the parishes were liable in the present case.

2. As to the Crown—That Fisher having been indicted by the Crown, and having been sentenced to be confined for the public security, only in consequence of his being brought before the Court of Justiciary for the commission of a criminal act, the burden necessarily fell on the Crown as representing the public, for whose behoof this confinement was ordered. But besides, that by the Regiam Majestatem, which, whether authentic or not, undoubtedly contains the laws in observance in Scotland at an early period, furious men are directed to be imprisoned by the Justiciar or Sheriff of the county; and by the act 1487, c. 101, trespassers arrested by the Crown are directed to be kept by the Sheriff 'on 'our Soveraine Lord's expenses, quhair it failzies of their aun 'gudes,' until the Justice Ayr; so that originally all persons liable to be committed by the Sheriff were to be maintained at the public expense; and consequently that the rule must still hold, except as to those cases where the burden has been laid by statute on other bodies,—as the case of prisoners before trial, who must be maintained by the counties, or of ordinary criminals under sentence, who must be alimented by the burgh where they are imprisoned;—and in proof that the Crown was in use to maintain such lunatics confined by order of the Court of Justiciary, three instances, mentioned by Lord Pitmilly, where this had been done, were appealed to.

3. As to the Burgh of Wigton—That as the imprisonment of Fisher arose from his having been found to have committed a criminal act, it might be considered as in modum pœnæ, in which case the burgh of imprisonment would be liable in his maintenance.

For the Parishes it was contended, That this not being a case

as to the ordinary aliment of a pauper, but a question as to the maintenance of a person indicted by the Crown, and sentenced to imprisonment by the Court of Justiciary, it did not fall within that class, the burden of which lay on them.

For the Crown it was argued, That whether Fisher was to be considered as a pauper, or as a criminal under sentence, the Crown could not be liable for his aliment, which in the one view fell on the parish of his settlement, and in the other on the burgh of imprisonment; and that his being confined for the security of the public could make no difference, as had been determined in the case of Scott *v.* Thomson, in which the lunatic had been apprehended and confined on the application of the procurator-fiscal; and as to the cases alluded to, that they had all occurred in Edinburgh, where there is a special and peculiar practice on the part of the Crown to aliment all prisoners, both prior and subsequent to trial.

Lastly, it was contended for the Burgh, That this was not truly a case of imprisonment in modum pœnæ, the person here not being capable of committing a crime, but a confinement for security of the public, the burden of supporting the lunatic during which could not possibly fall on the burgh, which could in no event be liable for the maintenance of prisoners not under sentence for crime; and that, even as to these, the liability of burghs was extremely doubtful.

On advising these informations, the Court adhered to their former interlocutor assoilzieing the parishes, (see ante, Vol. II. No. 210,) and they also assoilzied the Magistrates of Wigton, but decerned against the Officers of State, who reclaimed against the judgment so far as it decerned against them; but, in so far as it assoilzied the Magistrates of Wigton, it was allowed to become final, and it was necessarily final in regard to the parishes.

The reclaiming petition for the Officers of State, after having been answered by the Commissioners of Supply, was superseded until the case of Ramsay,* then depending, should be decided. On the decision in that case being pronounced, Cases were ordered in this process. In these it was contended for the Officers of State, in addition to their former pleas, That the freedom of the Crown from the burden of maintaining prisoners after sentence having been settled by that decision, they were entitled to be assoilzied from the present claim of relief; and that if the Commissioners of Supply were thereby cut out of all recourse, it was owing to their own neglect in allowing the interlocutor in favour

* See Ramsay &c. *v.* Officers of State &c. March 1. 1825, (ante, Vol. III. No. 400.)

of the burgh to become final, and thus permitting to escape that party on whom the burden, according to the above-mentioned decision, would have fallen.

The Court adhered to their former judgment.

Lord Justice-Clerk.—I retain my opinion formerly delivered, that, under the peculiar circumstances of this case, the County of Wigton ought to be relieved by the Crown; and I do not feel myself at all fettered by the judgment in the case of Ramsay, in which I concurred, as the present case is totally different. The cases adverted to by Lord Pitmilly, and afterwards founded on by the parties, go a considerable way to show that in practice, where the Court of Justiciary, in the discharge of their public duty, have been compelled to secure maniacs who had committed criminal acts, it is incumbent on the Crown to aliment them while in custody; and the interference of the Crown by remission, which I think was a very objectionable proceeding, rather tends to confirm me in my opinion than otherwise.

Lord Pitmilly.—As a question of expediency and propriety, the Crown, as representing the public, certainly *ought* to bear the burden in cases of this nature; but I have great difficulty in discovering any legal principle for subjecting it. The cases which have been alluded to were mentioned by me in reference to the question with the parishes. But all these cases occurred in Edinburgh, and I cannot give much faith to them now, as it appears that the Crown has always paid the expense of alimenting prisoners after sentence in Edinburgh. But there is one case, that of M'Killigan at Inverness, and another at Perth, where the Crown did not maintain the lunatic. I do not think, therefore, that these instances are sufficient to make the obligation good against the Crown, and otherwise I cannot see any legal principle for imposing on it such a burden. The county have been very liberal; but they have themselves to blame, if they fail to obtain relief. They might have succeeded, to a certain extent at least, against the parishes, had they brought a proper action; but they did not do so, and they have also allowed the burgh to escape, against which they had a good claim.

Lord Alloway.—I think the decision formerly pronounced as to the parishes was right; and as to the burgh, the person here was in a very different situation from prisoners confined in modum pœnæ; so that the case of Ramsay does not apply to the present, and the Court therefore were also right in assoilzieing the town of Wigton. But even were it otherwise, and if there had been any neglect in allowing the interlocutor assoilzieing the town to become final, it would have lain with the Officers of State, against whom judgment was given, and who were therefore called on to reclaim against that part of the interlocutor, if they wished to keep the question as to the burgh

open. In regard to the question of the Crown's liability, I have been in some degree moved by the cases which we owe to the diligence of Lord Pitmilly, while there is not a single instance of the county having borne the burden of maintenance in cases similar to this. Then, if we go to general principles, I still think that the liability rests with the Crown. Whether the Regiam Majestatem be genuine or not, there can be no doubt that, from the time of its publication, the rules contained in it were in practice acted on in Scotland; and it appears from it that it was the duty of the Justiciar or the Sheriff to seize furious persons, and put them in bonds; and being so seized and confined, they must necessarily in those early periods have been supported out of the public funds, as there were no other funds which could possibly be applied to that purpose. The burdens subsequently imposed on burghs, and the rogue-money leviable from counties, are applicable to entirely different purposes, not including such a case as this. It is clear, therefore, that there could be no funds for the support of persons thus confined but those of the public, for whose behoof they were secured; and looking also to the act 1487, I am of opinion that on general principles the Crown alone can be subjected in this burden.

Lord Justice-Clerk.—I wish to explain in reference to the case of M'Killigan, mentioned by Lord Pitmilly, that it was of a very peculiar nature, and cannot be used as a precedent here. The person there was charged with murder. When brought up, he appeared insane; but the Judge, instead of allowing evidence to be led of his insanity, recommitted him, and continued the diet against him, and he remained ten years in prison on that warrant, and no other; so that the case was entirely different from this. In regard to the case of Scott *v.* Thomson, I would also wish to observe that it is quite apart from this. The Sheriff there, to rid the neighbourhood of a madman, (who, however, had committed no crime,) had him taken up; and although the Court found, that, until his true parish was found out, the one where he had haunted previously to being taken up must aliment him, yet, with deference to that judgment, I do not think it can at all affect a case like this, where the lunatic has committed a crime, and has been confined by order of the Court of Justiciary.

V. Hathorn, W. S.—Hunter, Campbell, and Cathcart, W. S.—Cuningham and Bell, W. S.—F. Wilson, W. S.—Agents.

W. DIROM, Suspender.—*Skene—Gillies.* No. 360.
JOHN BOYD, Charger.—*Robertson.*

Bill of Exchange.—A party having granted a promissory note, payable to the creditor of another party, and that party having delivered it for value to the creditor—Held, that although the creditor had not given value to the granter, yet he was entitled as an onerous holder to recover payment from him.

June 7. 1827.
1st Division.
Bill-Chamber.
Lord Newton.
D.

DIXON having purchased goods from Boyd to the amount of £27, obtained a promissory note from Dirom in favour of Boyd, which Dixon (whose name did not appear on it) delivered to Boyd, and guaranteed the payment of it. When it fell due, Boyd having charged Dirom to pay it, he presented a bill of suspension, alleging that he had received no value for it,—a fact which he referred to Boyd's oath. Accordingly Boyd emitted the following deposition:—'Being interrogated, if the suspender was ever 'indebted to the charger one sixpence during the whole course 'of his life? depones, That he owes the amount of the promis-'sory note in question to the deponent. Interrogated, in what 'way the debt alleged to be contained in the promissory note 'was contracted? depones, That he received the bill from Mr. 'Grier Dixon, baker in Edinburgh, who guaranteed the regular 'payment thereof by his letter to the deponent, dated 20th 'August 1826, and therefore the deponent credited Mr. Dixon's 'account with the nett proceeds of the bill in question. Interro-'gated, if he gave value to the suspender for the note in ques-'tion? depones, That he gave value to Mr. Dixon, as above de-'poned to, from whom he received the bill, and who guaranteed 'the regular payment of it, and against whom he preserved re-'course. Interrogated, if the note was made payable to Mr. 'Dixon, or if it was indorsed by him to the charger? depones, 'That the note was drawn payable to the charger's order, and 'not indorsed, and Mr. Dixon's name does not appear on the 'bill.'

The Lord Ordinary passed the bill, 'in respect it is admitted 'that the charger gave no value to the suspender, and that Mr. 'Dixon, to whom he depones that he gave value, does not appear 'to have had any right to the note charged on.' But Boyd having reclaimed, and contended that it was proved by his oath that he was an onerous holder, the Court altered, and refused the bill.

D. CLYNE, S. S. C.—J. MURDOCH, S. S. C.—Agents.

No. 361.

J. Cook, Suspender.—*D. of F. Moncreiff—Jameson.*
Moffat and Couston, Chargers.—*Skene.*

Cautioner.—A cautioner having bound himself to pay for goods purchased by another within three months; and goods having in consequence been sold within that time; and a bill for the amount, payable at a period subsequent to it, having been taken from the purchaser; and when it fell due, another bill having been received by the seller, but the original bill having been retained—Held that the cautioner was liable to pay the debt.

June 7. 1827.

1st Division. Lord Eldin. S.

William Harley, merchant in Glasgow, being desirous to purchase goods from Moffat and Couston, merchants in Leith, and they being doubtful of his credit, and having required a guarantee, the suspender Cook and others, on the 20th of June 1821, granted this obligation:—'Mr. Harley having laid before 'us your letter to him, dated 4th May, we hereby engage to 'guarantee the payment of whatever flour he may purchase from 'you, to the amount of £500 sterling, and during the term of 'three months from this date.'

Moffat and Couston having thereupon sold him goods, Harley, on the 9th of July 1821, granted to them a bill for £84: 3: 6, payable three months after date. The bill fell due on the 12th of October, being subsequent to the expiration of the letter of guarantee, but was not paid; and after a great deal of correspondence, in which Harley threatened to suspend payment, on the ground of breach of bargain, he transmitted to them, in the month of November, another bill for the above sum. This bill was retained by Moffat and Couston, for the purpose, as they alleged, of being produced, in case Harley should attempt to suspend payment of the first bill. They then indorsed this bill to one Baird, to endeavour to recover payment as an onerous holder; but in this they did not succeed, and they afterwards got it retransferred to them. In January 1822 Harley paid £20 to account, after diligence had been raised on the original bill, and soon thereafter his estates were sequestrated.

Moffat and Couston then brought an action before the Magistrates of Glasgow against Cook and the other guarantees, concluding for payment, in which having obtained decree, Cook brought a suspension, in which he contended,

1. That although the letter of guarantee was limited to three months, yet they had given Harley credit for a longer period, by taking his bill payable subsequent to the expiration of that time; and,

2. That by taking the second bill without the consent of the cautioners, and by delaying to follow forth diligence against Harley, all claim against the cautioners had been lost.

To this it was answered,

1. That the period specified in the letter had reference to the furnishing of the goods to Harley, and not to the payment of them, and that those for which the bill had been granted were sold and delivered within that time; and,

2. That in taking the first bill they had merely given Harley the ordinary credit to which he was entitled; that the second bill had not been received in lieu of the first, which had been retained, and diligence done on it; and that it was not relevant to allege that they had not followed forth their diligence.

The Lord Ordinary repelled the reasons of suspension, and the Court, without hearing the counsel for the chargers, unanimously adhered.

LORD PRESIDENT.—If the letter had limited the period of credit to be given to Harley to a precise time, there might have been a well founded plea on the part of the suspender; but the letter is not to that effect. The suspender and the other cautioners bound themselves to pay for all goods delivered within three months from its date, and it lay with the chargers to allow the payment to stand over as long as they pleased.

LORD BALGRAY.—Certainly, provided the period did not exceed the ordinary term of credit. In this case, the chargers took a bill at three months, which is not denied to be the proper term of credit. Suppose the goods had been delivered on the last day of the three months, and that the chargers had not immediately insisted on payment from Harley, is it possible to maintain that they would thereby have lost the benefit of the letter?

LORD CRAIGIE.—The question is, whether time has been improperly given in the sense of law. I think not.

LORD GILLIES concurred.

Suspender's Authority.—Marshalls v. Bank of Scotland, H. of L. 1824.

CAMPBELL and MACDOWALL,—T. DARLING, S. S. C.—Agents.

MARTIN and SIMPSON, Pursuers.—*Skene—J. M. Bell.*
J. LEISHMAN, Defender.—*R. Bell—Robertson.*

No. 362.

June 7. 1827.

1st DIVISION. Lord Eldin.

THIS was a question as to whether there was evidence of the pursuers (who were writers in Paisley) having been employed as agents by the defender. The Lord Ordinary assoilzied the defender, but the Court altered, and decerned against him.

C. J. F. ORR, W. S.—J. STUART, S. S. C.—Agents.

No. 363. EARL of MAR, Pursuer.—*Jeffrey—Miller.*
G. ALEXANDER, Defender.—*Fullerton—Skene.*

Title to Pursue—Salmon-Fishing.—The estates of a family united into an earldom, the titles to which included a certain salmon-fishing within specified limits, having been forfeited to the Crown for accession to the rebellion in 1715; and having been afterwards purchased (under certain specified exceptions) from the Parliamentary Commissioners by a party who afterwards transferred them to the attainted family; but the conveyances containing merely a general right of salmon-fishing belonging to the earldom, and not mentioning the special right as contained in the ancient investitures—Held that the family had a sufficient title to pursue a declarator of their exclusive right to this fishing.

June 7. 1827.
2D DIVISION.
Ld. Mackenzie.
M'K.

THE possessions of the family of Mar were united into an earldom, including, inter alia, a right of salmon-fishing in the river Forth, 'from the Abbey boat of Cambuskenneth to the Carron 'mouth,' which had originally belonged to the Abbey of Cambuskenneth. On the attainder, for accession to the rebellion in 1715, of John Earl of Mar, who had been infeft in the earldom under a charter dated in 1699, containing per expressum the right of fishing as above mentioned, the estates of the family were forfeited to the Crown, and were by act of Parliament vested in certain Commissioners nominated for that purpose. By these Commissioners the whole estates, under certain specified exceptions which did not include the right of salmon-fishing, were exposed to sale, and purchased for behoof of the attainted family by Erskine of Grange. In the minute of sale, the Commissioners, after narrating that Erskine of Grange (Lord Grange) 'did at 'the public sale by cant or auction of the estate which belonged 'to John Earl of Mar, attainted, purchase the same,' proceeded to specify the particulars included in the purchase, 'viz. all and 'haill the earldom of Mar, comprehending the lands, lordships, 'baronies, and others under written,' and in the enumeration following were mentioned 'salmon and other fishings, &c. belonging to 'the said earldom, lordships, and baronies.' This minute of sale also contained a clause, which, 'for preventing all mistake re-'lating to the estate of the late Earl of Mar, sold conform to 'the within minute,' declared that certain specified particulars should not be comprehended under the sale; but these exceptions did not include any of the rights of fishing. In implement of this minute, the Commissioners executed a disposition in favour of Lord Grange, whereby they disponed 'all and haill the foresaid 'estate, above and under written, as the same was bruiked and 'enjoyed by the said John late Earl of Mar, attainted, at the

'time of his said attainder, and as the same are more particularly 'expressed and designed in the infeftments thereof; viz. all and 'haill the earldom of Mar, comprehending the lands, baronies, 'and others under written.' The disposition then specified the several lands, together with 'salmon and other fishings, &c. be-'longing to the said earldom, lordship, and baronies.' Lord Grange afterwards conveyed a joint interest in the estates to Erskine of Dun, (Lord Dun,) by whom one half of the purchase money had been advanced; and during their possession Lords Grange and Dun sold certain parcels of lands, in none of the dispositions to which was there any right of fishing conveyed. In 1739 they executed an entail of the Mar estates in favour of Thomas Lord Erskine, and a certain series of heirs, from which they specially excepted the parcels sold by them, and also reserved to themselves the lands of Easter and Wester Grange, under a condition expressed in a separate contract, that if Lord Erskine should relieve them within a certain period of the debts contracted by them in relation to the premises, they should make over to him and the other heirs of tailzie these lands, and 'haill perti-'nents thereof;' but, under these exceptions, the deed of entail conveyed 'all and haill the foresaid earldom of Mar, in so far 'as the same has not been disponed by us,' in the same terms with those used in the titles derived from the Parliamentary Commissioners as above mentioned.

Lord Erskine made up titles under this entail, and dying without issue, he was in 1766 succeeded by his sister Lady Frances Erskine, who served heir of tailzie and provision to her brother, and was infeft on a precept from Chancery; and in the retour of her service express reference was made in the quæquidem to the ancient investitures of the family, and the salmon-fishings were mentioned in terms of the charter of the attainted Earl. On the death of Lady Frances, her son, the late Earl John Francis, (restored by act of Parliament after the present action was brought,) was served heir of tailzie and provision, and in the special retour of his service the right of fishings was repeated in the same terms.

Founding on these titles, this action was raised by the present Earl and his father against Lord Abercromby and the other proprietors of lands situated on the Forth, between the Abbey boat of Cambuskenneth and the Carron mouth, to have it found and declared that they had the exclusive right of fishing within these bounds. An objection to their title to pursue having been taken by Lord Abercromby, that question was discussed with his Lordship alone,—the action being allowed to fall asleep as to the other defenders. The title of the pursuers having been

ultimately sustained by the Court in the question with Lord Abercromby, the action was revived against the other defenders, and in particular against Alexander, the proprietor of the lands of Powis, situated within the limits to the exclusive right of fishing in which the pursuers claimed right. Besides his defence on the merits, Alexander renewed the objection discussed with Lord Abercromby, that the Earl of Mar had no title to pursue, in so far as there was no express mention of the right of fishing in the conveyance by the Parliamentary Commissioners to Lords Grange and Dun, or in the deed of entail executed by them in favour of the pursuer's predecessor, from which it must necessarily be inferred that the attainted Earl had lost that right between the date of his infeftment and his attainder. They also contended, that it appeared from a process of declarator in 1682, between the then Earl of Mar and the Earl of Callander, that the right, as under the old investitures, was merely a *right to levy* kain fish from the boats within the limits described in the charter, but not a proper right of salmon-fishing; and at all events, that any right of salmon-fishing belonging to the attainted Earl was to be considered as a pertinent to the lands of Grange, which had been reserved in the deed of entail, and the proprietors of which had been found by the Court, in an action with one Galloway, in 1755, to have right to salmon-fishing ex adverso of their lands, on the titles flowing from Lords Dun and Grange.

To this it was answered, That the attainted Earl having been infeft per expressum in the fishing in question, it must be presumed to have remained in his person at the time of his attainder, unless it could be shown that he had disponed, or otherwise ceased to possess it:—that every right belonging to the Earl at his attainder was vested in the Parliamentary Commissioners, and that every right conveyed to them was disponed to Lords Dun and Grange, under certain specified exceptions, which did not include this right of fishing:—that in like manner, all the rights which had belonged to the earldom in the person of the attainted Earl, and thus vested in Lords Dun and Grange, had been transmitted by them to the pursuer's predecessors, under the exceptions specified in the minute of sale by the Commissioners, and the deed of entail itself; and accordingly, that the general conveyance of salmon-fishing must have reference to the special right mentioned in the ancient investitures of the family. Further, that the ancient titles clearly proved that the right of fishing belonging to the family of Mar was not an appendage to the lands of Grange, but a separate tenement; and that the case with the Earl of Callander did not at all warrant the conclusion that it was restricted

to a right of kain fish; while, on the other hand, the title of the pursuer, as to a proper right of salmon-fishing within these limits, had been sustained by the Court in the case with Galloway, and in this present action in the discussion with Lord Abercromby.

The Lord Ordinary having reported the cause on informations, the Court unanimously sustained the title to pursue, and remitted to the Lord Ordinary to hear parties on the merits.

INGLIS and WEIR, W. S.—J. FORMAN, W. S.—Agents.

A. MEIN, (Trustee on J. TAYLOR's Estate,) Pursuer.—*Jeffrey—Baird.* No. 364.

M. TAYLOR and Others, Defenders.—*Greenshields—More.*

Fee, or Spes Successionis.—Lands having been conveyed to J. T. and three others, inter alia, for the purpose of dividing them into a certain number of shares, and the truster having declared, 'that I hereby appoint that 4½ of these shares shall 'be held by the said J. T. in liferent, during all the days and years of his life-'time, and at his decease the fee and property thereof shall be divided among the 'children lawfully procreated of his body as follows;' and having then specified certain proportions, and instructed the survivors or survivor of the disponees to see that they should be so divided; and the deed being granted under these conditions—Held that J. T. was merely a liferenter, and that his children were fiars.

June 8. 1827.

1ST DIVISION. Ld. Corehouse. H.

ON the 7th of April 1819, John Taylor of Springbank executed a disposition and deed of settlement, by which, on the narrative of his affection 'to his brothers after named, and to their 'children,' he therefore, 'under the burdens, provisions, and de-'clarations, and for the purpose of being divided, and held in 'manner under written,' disponed his whole estate, 'heritable and 'moveable, to and in favour of James Taylor, baker in Whit-'burn, Thomas Taylor, farmer in Bankhead near Falkirk, Ro-'bert Taylor, baker in Glasgow, and William Taylor, grocer 'there, my brothers, heritably and irredeemably,' &c.; 'surro-'gating and hereby substituting the said James Taylor, Thomas 'Taylor, Robert Taylor, and William Taylor, in my full right, 'title, and place of the whole premises, with power to do every 'thing thereanent which I could have done in life; and for carry-'ing these presents into effect, I bind and oblige myself, my heirs 'and successors, to infeft and seise the said James Taylor, 'Thomas Taylor, Robert Taylor, and William Taylor, their 'heirs and assignees, in the whole lands and other heritages above 'disponed requiring infeftment:'—'But declaring always, as it is 'hereby specially provided and declared, that these presents are 'granted, and to be accepted by my said disponees, under the 'burdens and conditions under written, and that the said sub-'jects shall be held by them in liferent, and belong to their child-'ren in fee in the proportions after specified.' After providing

for payment of his debts, and a provision to his wife, the deed then proceeded:—'Under these burdens, my said subjects shall be 'held by my said disponees in the proportions and on the terms 'and conditions following, viz. my said disponees shall divide the 'same into twelve equal shares or parts; and I hereby appoint 'that four and one half of these shares or parts shall be held by 'the said James Taylor in liferent during all the days and years 'of his lifetime, and at his decease the fee and property thereof 'shall be divided among the children lawfully procreated of his 'body as follows; viz. one equal share to each of his sons, and 'one equal share to his two daughters, Mary Taylor, spouse of 'James Ross in Carluke, and Ann Taylor, spouse of Thomas 'Grosart, late baker in Glasgow, to be divided equally among 'them: Declaring, that the survivors or survivor of my said dis-'ponees shall see the share devised to the said Mary Taylor and 'Ann Taylor equally divided betwixt them, and the half belong-'ing to the said Mary Taylor secured to her in liferent, and to 'her children equally among them in fee, and the other half se-'cured to the said Ann Taylor in liferent, and to her children 'equally among them in fee.' In the next place, I hereby ap-'point that two of the foresaid shares shall be held by the said 'Thomas Taylor in liferent during all the days and years of his 'lifetime, and at his decease the fee and property thereof shall 'be divided equally among the children lawfully procreated of 'his body, share and share alike. In the third place, I appoint 'that one of the said shares or parts shall be held by the said 'Robert Taylor in liferent during all the days and years of his 'lifetime, and at his decease the fee and property thereof shall 'belong to Elizabeth Taylor, his daughter; but if he shall leave 'any other lawful child or children, the same shall be divided 'among his whole lawful children, share and share alike; and, in 'the fourth place, I hereby appoint that four and one half of the 'foresaid shares or parts shall be held by the said William Tay-'lor in liferent during all the days and years of his life, and at 'his decease the fee and property thereof shall belong to and be 'divided among the children lawfully procreated of his body, 'share and share alike. And I hereby provide and declare, that 'in case any of the children of my said brothers shall die, leaving 'lawful issue of their bodies, the share which would have de-'scended to such deceased shall belong to and be divided among 'his or her children equally, share and share alike; and in these 'terms this general conveyance of my subjects above written shall 'be accepted and held by my said disponees, and not otherwise.'

The deed contained neither procuratory nor precept; and on

the death of the granter, Thomas Taylor, his immediate elder brother, expede a general service, under which titles were completed in terms of the above deed. At the date of it, James Taylor had children alive, but he thereafter became bankrupt; and Mein having been appointed trustee on his estate, brought an action of declarator to have it found that although, ex facie of the deed, James was only a liferenter, yet, as the fee was granted to children nascituris, it vested in him by virtue of law. On the other hand, the children of James maintained in defence, That he, as one of the four trustees, held the fee in trust for them, and that he had no beneficial interest under the deed except a bare right of liferent.

The Lord Ordinary assoilzied the defenders, and the Court adhered.

The LORD ORDINARY issued this note of his opinion:—When a conveyance is made to one in liferent, and his children unnamed or unborn in fee, it is settled law that the fee is in the parent, and that the children have only a hope of succession, to prevent the infringement of the feudal maxim, that a fee cannot be in pendente. It is perhaps to be regretted that the point was so settled, because the plain intention of the maker is in consequence often sacrificed to a mere form of expression; and the feudal maxim might have been saved, by supposing a fiduciary fee in the parent, as is done when the liferent is restricted by the word allenarly or only. Upon this point, however, it is too late to go back; but certainly the principle ought not to be extended to cases which have not yet been brought under it. In the present case, the subjects are not disponed to the Messrs. Taylor in liferent, and their children in fee, but, on the contrary, to the Messrs. Taylor in fee; because the obligation to infeft is in favour of them and their heirs and assignees. The question therefore is, whether the fee so given is absolute or qualified,—a question to be determined by the ordinary rules of construction. It appears clearly that it is a qualified or fiduciary fee, because it is granted under certain burdens and conditions. The disponees are required to divide the property into twelve equal shares, four and a half of which are to be held by James Taylor in liferent, two by Thomas in liferent, one by Robert in liferent, and four and a half by William in liferent; and it is declared, that at the death of each liferenter his share or shares shall belong to his children. The mode of division is also distinctly pointed out. In the case of James Taylor, who had children in existence, the disponees, or the survivor or survivors, are specially directed to divide the shares of the two daughters who are named equally betwixt them, and to secure them to the ladies in liferent, and their children in fee; and particular directions are also given with regard to the division of the shares of

Robert Taylor and William Taylor: all which implies that the disposition to the Messrs. Taylor is a trust to enable them to execute certain purposes. But where a fiduciary fee is given to a person, and it is directed that he himself shall enjoy the liferent, and still more clearly when a fiduciary fee is vested in several persons collectively, and the survivor or survivors, and each of them separately, is to have a liferent, such liferent must be construed a naked usufruct, in the same manner as if it had been qualified by the word allenarly. See the case of Seton against the Creditors of Hugh Seton, 6th March 1793.

LORD PRESIDENT.—I never was clearer in any case, and do not wish to hear the counsel for the defenders. James was one of four trustees. The conveyance was taken to them in that character, and for various purposes. One of these purposes was, that four and one half shares should be held or enjoyed by James in liferent, and by his children in fee; then, after his death, it is declared that the trustees shall proceed to divide them among his children in certain proportions. The fee, therefore, never was in James, but in the trustees, and will continue to be so till his death, when the shares must be divided in the mode pointed out. It is impossible, therefore, to maintain that the fee is vested in James.

LORD CRAIGIE was desirous to have heard the counsel for the defenders; but the other Judges having declined to do so, he expressed his opinion, that, from the terms of the deed, every thing thereby conveyed was vested in the four brothers; that if they had no children, then the fee would belong to them, so that the vesting of the fee would be dependent on the existence or non-existence of children; but that in such cases it had been settled that the fee vested in the parent, and that the children had a mere spes successionis.

LORD BALGRAY was of a different opinion. The conveyance was to the four brothers as trustees. They were therefore trustees for the respective rights of liferent and fee provided for by the deed; and consequently the fee could not vest absolutely in James, but only as one of four trustees.

LORD GILLIES concurred in the opinion of the Lord Ordinary. It was no doubt true that the fee was conveyed to the four brothers; but that was under a declaration that they were to hold it in trust for various purposes, among which it was provided that each of them was to have a liferent, and that the children should have the fee. Besides, the trustees were to divide the shares in certain proportions among the children after the death of James; showing clearly that they were to be held in trust for them, and it was also declared that this should be done by the survivor or survivors.

J. A. CAMPBELL, W. S.—W. WADDELL, W. S.—J. PEDDIE jun. W. S.—Agents.

W. MARTIN.—*Sol.-Gen. Hope.* . . . No. 365.
W. UNDERWOOD.—*Murray—Henderson.*

Mandatory.—Held that a mandatory in a process can only be liberated from his liability for subsequent expenses by entering a minute on the record, withdrawing from acting as such.

June 8. 1827.
1st Division.
Lord Eldin.
H.

AN adjudication having been brought by Marstens, who resided in England, against Linton, on a bond which declared that diligence might proceed at the instance of Martin and Thomson, writers in Lockerbie, these parties appeared as mandatories. This adjudication was opposed successfully by Underwood, and he was found entitled to expenses. (See ante, Vol. V. No. 120.) In the course of the litigation, Thomson's name was alone made use of as mandatory, and the decree for expenses was issued against him as such; but Martin did not enter any minute on the record withdrawing his appearance as mandatory. When the Auditor's report came to be approved of, Underwood moved for decree against Martin, and the Lord Ordinary decerned against him accordingly. Martin then reclaimed, and contended, That as he had ceased to act as mandatory before Underwood appeared, and as the whole litigation had been conducted in name of Thomson, and decree had been taken against him alone, he could not be made liable in expenses. But the Court, unanimously holding that it was a settled rule, that a mandatory could only be liberated from subsequent expenses by entering a minute on the record withdrawing, and that Martin had not done so, adhered.

Underwood's Authorities.—Nelson, Feb. 13. 1822, ante, Vol. I. No. 335; Hamilton, May 18. 1822, ante, Vol. I. No. 477; Clarke, Nov. 17. 1825, ante, Vol. IV. No. 182.

W. M. LITTLE,—W. MARTIN,—Agents.

J. ERSKINE, Pursuer.—*Fletcher—Spiers.* No. 366.
D. SCOTT, Defender.—*Robertson—Wilson.*

L. O. decerned against the defender, and the Court adhered.

June 8. 1827.
1st Division.
Lord Eldin.
D.

J. A. CAMPBELL, W. S.—SCOTT and BOOG, W. S.—Agents.

No. 367. J. C. PORTERFIELD, Pursuer.—*D. of F. Moncreiff—Anderson.*
TRUSTEES of A. PORTERFIELD, Defenders.—*Fullerton—Rutherfurd.*

June 8. 1827.
1st DIVISION.
Lord Eldin.
D.

IN this case the sole question was, Whether the muir of Duchal belonged in property to the pursuer, as heir of entail in possession of the estate of Porterfield and Duchal, or jointly with him to the defenders as representing the proprietor of certain unentailed lands which till lately had been possessed by the heirs of entail? The Lord Ordinary found that both parties had a pro indiviso right in the property of the muir, and the Court adhered.

A. SWINTON, W. S.—A. PEARSON, W. S.—Agents.

No. 368. GIBSON, THOMSON, and COMPANY, Pursuers.—*Forsyth.*
CAMERON, Defender.—*Jameson.*

Jurisdiction—Process.—Two debts, each under £25, having been assigned to one person, without value, for the purpose of rendering it competent to bring the action in the Court of Session—Held that this was an evasion of the statute 50th Geo. III. c. 112, and that the action was incompetent.

June 9. 1827.
2D DIVISION.
Lord Medwyn.

CAMERON, a vintner in Inverness, commissioned one Wilson to order for him certain quantities of porter and ale from Edinburgh. Wilson accordingly purchased for him from the pursuers, Gibson, Thomson, and Company, porter to the value of £19, and from Younger and Company, brewers in Edinburgh, ale to the amount of £24. 15s. Younger and Company then assigned their claim to the pursuers, without having received value, in order that the latter might bring an action before the Court of Session for their joint behoof. To the competency of this action it was objected, That the two sums pursued for being separate debts, of an amount which could not have been sued for separately in this Court, and the one being conveyed to the pursuers without value, merely to enable them to bring their action in the Court of Session, it was an attempt to evade the provisions of the act 50th Geo. III. c. 112.

Lord Medwyn having reported the cause, and stated his opinion that it was an evasion of the statute, the Court consulted the other Division; and all the Judges being of opinion that it was an incompetent action, and an evasion of the statute, their Lordships instructed the Lord Ordinary to find accordingly.

Major James Taylor and Commissioners, Pursuers.— No. 369.
D. of F. Moncreiff—Miller.

Sir W. Forbes and Company, Defenders.—*Skene—Anderson.*

Executor—Debtor and Creditor.—Held that a debtor of a party deceased is warranted to pay to his executor nominate, although unconfirmed; and that a knowledge of a certain sum being set apart by the deceased as a provision for his wife and children does not put the debtor in malâ fide to transfer a sum to the account of the executor of similar amount at the credit of the deceased,—the particular sum in question not having been appropriated by the deceased to that purpose.

June 9. 1827.

2d Division.

Ld. Cringletie.

M'K.

The late John Taylor, father of the pursuer, by deed of settlement executed in 1803, conveyed his whole property to his eldest son Patrick, (whom failing, his other children in succession,) as his universal disponee and sole executor, directing, inter alia, 'that in the event of my not having done so during my lifetime, 'the said Patrick Taylor, whom failing, my other children in the 'order of their succession, shall immediately on my decease, and 'out of the first and readiest of my moveable estate, either de-'posit in a bank, or lay out on good landed security, in the option 'of my said spouse, the sum of £5000, and take the bank receipt 'or bonds therefor to her in liferent, during all the days and 'years of her lifetime, for her liferent use only, and subject to 'the deduction of £1000 to be paid to my daughter in the event 'of her marriage as after mentioned; whom failing, to the said 'Patrick Taylor and my other sons equally among them, or among 'such of them as shall be alive at the time of her death, and to 'the child or children of those sons who may have predeceased 'her.'

A few months before the date of this settlement, Mr. Taylor had withdrawn the sum of £5000 from an account kept with Sir William Forbes and Company of Edinburgh, in name of a concern of which he was a partner with two of his sons, Patrick and William, under the firm of John Taylor and Sons, and had placed it in an account then opened with the bank for the first time in his own name. This sum of £5000, with the interest accruing on it, and certain additions made to it, remained at Mr. Taylor's credit in his account with the bank at his death, which happened in 1813. For about a year after this event, the money remained in the account in name of the deceased; but in 1814 Patrick Taylor, the eldest son and executor nominate, applied to Sir William Forbes and Company to transfer it to an account to be opened in his own name; and to satisfy the bank that he was entitled to grant a discharge, he sent them his father's deed of

settlement. This deed was submitted to the law agent of the bank, who being satisfied of Patrick Taylor's title as universal disponee and sole executor of his father, drew up a regular discharge, which was subscribed by Patrick, who had not, however, been confirmed executor. The transference was accordingly made;—£5000 being transferred to a private account opened in name of Patrick Taylor, and the balance of £1751 of accumulated interest to the account-current of John Taylor and Sons, which concern was still carried on by Patrick and his brother William. In this state matters remained till 1817, no interest having been drawn on the £5000. At this period, the concern of John Taylor and Sons having become embarrassed, Patrick Taylor, to induce the bank to increase their accommodations, transferred this £5000 to a separate account opened in name of the company, while the accumulated interest was transferred partly to the credit of John Taylor and Sons' general account-current, and partly in payment of the interest of an heritable bond held by Sir William Forbes and Company.

Within a very short period after this second transfer, John Taylor and Sons became insolvent, and settled with their creditors on a composition of 10s. in the pound,—Sir William Forbes and Company making no claim on the estate, as their obligations were satisfied by the sums and securities held by them.

In the mean time, the pursuer Major James Taylor, second son of the deceased John Taylor, had gone early in life into the army, and he had been for the most part abroad with his regiment. On his return in 1822, finding that his brother Patrick had again become bankrupt, and was unable to implement his obligations as his father's executor, he raised the present action against Sir William Forbes and Company, concluding that they should be ordained to make payment to him of his share of the £5000 provided by his father's deed of settlement, on the grounds,

1. That as the will of the late Mr. Taylor had been submitted to Sir William Forbes and Company, they must have been aware that the £5000 standing at his credit at his death had been set apart by him as a provision for his wife and children, and therefore that they were not entitled to transfer it to the private account of Patrick the executor, and thereafter, immediately before the bankruptcy of John Taylor and Sons, to their account, to be liable for their obligations to the bank.

2. That Patrick, being the eldest son of the deceased, must be considered as a stranger quoad his father's moveable succession, and that, as a stranger executor nominate, Sir William Forbes and

Company were not warranted to make payment to him of executry funds without his having been confirmed; and,

3. That the transactions in question were not to be considered as a payment to Patrick as executor, but as a collusive transfer, which left the funds of the deceased still distinguishable, and which could not be allowed to prejudice the rights of parties claiming under the will in a question with Patrick's creditors.

To this it was answered,

That assuming Sir William Forbes and Company to be acquainted with the whole contents of the deed of settlement, from the circumstance of its having been submitted to their inspection, there was nothing in that deed to lead to the conclusion that the £5000 standing at the credit of the deceased had been set apart by him as a provision for his wife and children; but, on the contrary, the necessary inference was, that this sum was not so set apart, because, 1. The sum provided to the widow and children was directed to be placed on heritable security, or in a bank on a bond or receipt in name of the widow in liferent, and children in fee, while this sum was allowed to stand on a simple receipt to the deceased; 2. The deed of settlement was executed only a few months after this £5000 was placed to the credit of the deceased in his private account, and yet in it he assumed that he had not yet set apart the provision for his wife and children; 3. The widow was to liferent the sum provided in the will, but the interest of this £5000 was never drawn; and, 4. £1000 of the provision was to be paid to the daughter of the deceased on her marriage; but though that event took place, no such sum was drawn from this account.

In these circumstances, therefore, it was contended,

1. That the bank could not, consistently with a liberal system of doing business, refuse to transfer the sum in question to the private account of the executor, who was fully entitled to uplift and discharge it.

2. That an eldest son was not necessarily a stranger to his father's moveable succession; but that, at any rate, a debtor was entitled to pay to a stranger executor nominate without confirmation, although he thereby ran a certain risk in the event of his paying to a party not having truly the right to the office, and although he might insist on confirmation in order to secure himself against such risk; and,

3. That the transactions complained of were a fair bonâ fide payment to the executor of the deceased, which the bank were not only entitled to make, but which they could not have declined.

The Lord Ordinary assoilzied Sir William Forbes and Company, and the Court adhered.

The LORD ORDINARY observed in a note:—The fact, on which the pursuer founds his argument, in order to subject Sir William Forbes and Company to payment of his claim, is void of foundation. It is admitted that the late John Taylor, as long ago as the year 1803, put into the house of Sir William Forbes and Company, in his account-current with them, £5000, which stood in his own name at his death, and, with interest thereon, amounted to greatly above £6000; but that sum was not appropriated by Mr. Taylor to any particular purpose whatever. Certainly it was not deposited with the company on a note by them payable to Mrs. Taylor in liferent for her liferent use only, and his sons in fee, subject to the deduction mentioned in his will, dated in September 1813. The money lay as a balance due to him in his account-current, and was subject to the call of his eldest son Patrick Taylor, who was his father's sole executor. Accordingly, he did call for the money in 1814, when £5000 of it was transferred to the individual account of Patrick Taylor, and the balance to the account of John Taylor and Sons, of which company Patrick was a partner. On this occasion the will of John Taylor was shown to Sir William Forbes and Company, who remitted it to their agent, Mr. Thomas Cranstoun, who advised them that they were in safety to pay to Patrick Taylor, as he was one of the nearest of kin, and sole executor nominate of his father. Accordingly they transferred the money in the manner already described, and took a discharge, without requiring Patrick to be at the expense of a confirmation. The judgments of the Court warrant such a payment, and indeed this point was not disputed at the Bar; but it was said that the company saw the will, thereby knew the purpose for which the £5000 was destinated, and ought not to have paid it without confirmation, in which caution would have been found in the Commissary Court, whereby the pursuer would have recovered the money. But admitting for a moment that the company had examined the will, all that they would have seen was, that John Taylor ordered his executor, if he had not done so himself in his lifetime, to deposit in a bank, or lend on heritable security, £5000 for the purposes above mentioned. But they could not know that he had not deposited money in some other bank, or lent it on heritable security, on a note or bond payable to his wife in liferent, and his sons in fee. Sir William Forbes and Company were certain that the money in their hands had not been so applied, because it just stood as an article in John Taylor's account-current. The Lord Ordinary therefore thinks that the basis on which the pursuer founds his charge of error or oversight is wanting, and that the company were warranted in making the payment to Mr. Taylor's

executor nominate, and are not liable to repay the whole or any part to the pursuer.

The Judges were all agreed on the general point, that a debtor of a party deceased, while entitled to insist on a confirmation for his own security, is warranted in paying his debt to the executor nominate, though a stranger, without confirmation, taking the risk of his being really entitled to that character; and, with the exception of Lord Alloway, their Lordships were likewise of opinion that the view taken by the Lord Ordinary of the other parts of the case was correct.

Pursuers' Authorities.—3. Ersk. 9. 26; 3. Stair, 8. 53; 2. Bell, 96; Alison, Nov. 1765, (15132); Tait, Feb. 12. 1779, (3142); Bell, Nov. 28. 1781, (3861.)
Defenders' Authorities.—Baird, Feb. 3. 1744, (14393); Jamieson, Dec. 6. 1808, (F. C.); Spence, Feb. 20. 1751, (14399); Buchanan and Auld, July 20. 1784, (14378); Fraser, Feb. 10. 1784, (3921); Alison, May 26. 1802, (3922.)

J. FORMAN, W. S.—CRANSTOUN and ANDERSON, W. S.—Agents.

J. DODD, Advocator.—*Cockburn—Maitland.*
A. ALLAN, Respondent.—*Jeffrey—R. Bruce.*

No. 370.

June 12. 1827.
1st DIVISION.
Lord Eldin.
D.

THIS was a dispute between a landlord and his tenant, the decision of which depended on the import of a proof. The Sheriff of Haddingtonshire decerned against Dodd, but the Lord Ordinary assoilzied. The Court, however, altered, and affirmed the judgment of the Sheriff.

J. M'GREGOR,—W. LANG, W. S.—Agents.

A. THOMSON, Pursuer.—*A. M'Neill.*
J. MILLER, Defender.—*Cuninghame—Skene.*

No. 371.

June 12. 1827.
1st DIVISION.
Lord Eldin.
H.

IN this case a question was raised, whether an heritable creditor in possession is entitled to the expenses of a process for having the subjects repaired; but, in consequence of a final interlocutor of the Lord Ordinary, the Court found that they could not enter upon it, and pronounced judgment accordingly.

C. FISHER,—J. BLAIR, W. S.—Agents.

No. 372. Dame ALICIA DUNDAS or WEDDERBURN and Others, Pursuers.—*Sol.-Gen. Hope—Alison.*
J. DUNDAS, Defender.—*Cockburn.*

Prescription—Debitor non presumitur donare.—Circumstances in which,—1.—A debt incurred by an heir of entail, prior to recording the entail, was kept up against a succeeding heir, notwithstanding the lapse of 66 years.—2.—The maxim, debitor non presumitur donare, held not to apply to the case of a father settling provisions on his children to an extent greater than he was bound to do by his contract of marriage.

June 12. 1827.
2D DIVISION.
Lord Pitmilly.
B.

THE late James Dundas of Dundas, father of the pursuers, and grandfather of the defender, possessed the estate of Dundas under an entail executed in 1669, but not recorded till 1774. In 1764 he granted to Major Charles Lyon a promissory note for £600 of money borrowed from the latter, who, of the same date with the promissory note, annexed to it the following holograph appointment or settlement:—'I desire that the interest of the 'above £600 sterling may be paid yearly to my sister Susan 'during her life, and the principal sum itself, with whatever in-'terest shall thereafter become due upon it, I do hereby dispose 'of it in favour of Mr. Dundas' daughters or other younger 'children by his present wife, in the manner that shall by Mr. 'and Mrs. Dundas be found most convenient.' Shortly after this Major Lyon died, and in 1766 Mr. Dundas executed a bond in favour of Miss Lyon, which proceeded on this narrative:—'Whereas I was addebted and resting owing to Charles Lyon, 'Esq. Major of General Alexander Marjoribanks' regiment, in 'the service of the States of Holland, now deceased, certain sums 'of money, as to which it was agreed between the said Charles 'Lyon and me, that in case of his death before his only sister 'Miss Susan Lyon, I should, in lieu and place of making pay-'ment of the said sums, grant to Miss Susan Lyon a bond of an-'nuity for £30 sterling, payable yearly at two terms, during all 'the days of her life.' The bond accordingly contained an obligation to pay such an annuity, and declared that Miss Lyon, by acceptance thereof, discharged all debts due by Mr. Dundas to Major Lyon. Miss Lyon accepted this bond, and the £30 was paid to her yearly during her life.

In 1772 Mr. Dundas executed a bond of provision in favour of his four daughters, which bore to have been delivered to the late Lord Melville, 'to be kept by him as a delivered evident for behoof 'of my said daughters;' and it contained an obligation to pay to each of them £700, and an annuity of £35 a year, redeemable for £350. This was more than the entail allowed to be laid on the

estate in favour of younger children, and also more than he was bound to do by the marriage-contract with his wife, (a daughter of Lord Forbes, through whom his son and heir succeeded to considerable funds, the produce of estates in England,) although, under the marriage-contract, the spouses were entitled to settle on their younger children such part of the produce of the English estates as they might think fit.

In 1773 (the entail not being recorded till the subsequent year) Mr. Dundas executed a trust-disposition of his whole lands and estate in favour of certain persons, of whom his brother John Dundas and the late Lord Viscount Melville, then his Majesty's Solicitor-General for Scotland, were two,—for the purpose, after answering a reserved annuity to himself, of paying off his whole debts, and thereafter to denude of the lands conveyed; but declaring that the trustees 'shall be entitled to retain possession of 'the said lands and estate, even after my decease, ay and until 'they be relieved of these obligations, which are hereby declared 'to be a real burden upon the whole of said lands themselves;' and further providing, 'that in case the purposes of this trust 'shall not be fulfilled before my decease, then my said trustees 'shall be obliged to denude, upon their being relieved of their 'obligations as above mentioned, in favour of the heir entitled to 'succeed to me in the foresaid lands and estate.' Great part of Mr. Dundas' debts were unliquidated at the period of his death, which happened in 1780, and his son and heir, George Dundas, executed a deed, consenting to the subsistence of the trust till the trustees should be relieved of their obligations for payment of his father's debts.

George Dundas died in 1792, and was succeeded by his son, the present defender, then a minor. The estate still continued in the hands of the trustees; and it appeared that in 1803 Lord Melville, one of their number, and the person with whom the late Mr. Dundas' bond of provision to his daughters was lodged as a delivered evident for their behoof, found among some old papers the promissory note to Major Lyon, with the holograph appointment thereto annexed. This he transmitted to Mr. John Dundas, writer to the signet, also a trustee, and agent for the truster's family, who, in answer to his Lordship, observed,—'I remember, 'when a settlement took place betwixt the late James Dundas 'and Miss Lyon after her brother's death, no evidence in writing 'could be found of the sum due to the Major. A state therefore 'was made up from Mr. Dundas' memory, making the sum due 'the Major £600, and the bond was granted for an annuity 'equal to the interest of this sum. The note of hand and Major

'Lyon's appointment as to the application of the sum must have 'been put into your Lordship's hands as a mutual friend to the 'parties; and I submit to your Lordship if the discovery of it 'does not add £600 sterling to the debt on the estate of Dundas, 'and that, on the death of Miss Lyon, the trustees ought to pay 'over this sum to the late James Dundas' daughters.'

In reply to this, Lord Melville wrote Mr. John Dundas:— 'There can be no doubt the promissory note I sent you creates 'an addition of £600 of debt on the estate of Dundas, and that, 'after the death of Major Lyon's sister, it must be paid to the 'daughters of James Dundas of Dundas.' Accordingly, an entry of the debt was made in the accounts and views of affairs made up by the trustees, and the £30 payable yearly to Miss Lyon, which had formerly been entered in the books as an 'annuity,' was thereafter entered as 'interest' of the debt to Major Lyon.

In the year 1805 the trustees, having in their hands funds exceeding the debts remaining unextinguished, drew up a state of the affairs of the trust, with a view to wind it up, and denude in favour of the defender, who was still a minor. In this state the £600 in question was mentioned as an outstanding debt due to the late James Dundas' daughters, after the expiry of Miss Lyon's liferent; and it was proposed that the trustees should convey to the defender the estate vested in them in trust, and assign to him what balance should remain in their hands, on his tutors granting them a discharge, and 'becoming bound to procure and report 'discharges of all outstanding debts due by the late James Dun- 'das of Dundas, or his father, or their predecessors, at and pre- 'ceding the trust-disposition, so that no debt may remain to affect 'the estate prior to the 23d February 1773, the date of the trust- 'disposition.' This was accordingly carried into execution, and no objection was ever stated by the defender, who attained majority in 1814, and continued thereafter to pay to Miss Lyon the £30, (which was entered in his factor's accounts as 'interest,') until her death, which did not take place till the year 1820. On this event, the pursuers, daughters of the late Mr. Dundas, demanded from the defender payment of the £600 due to Major Lyon, and destined by his note of appointment to them after Miss Lyon's death, as being a debt of the late Mr. Dundas prior to the recording of the entail, and granting the disposition above mentioned. This the defender refused to do without the authority of the Court, as being an heir of entail, and not representing his grandfather otherwise. The pursuers thereupon raised the present action, in defence against which the defender pleaded,

1. Prescription by the sexennial and the long prescription.

2. The discharge by Miss Lyon to the late Mr. Dundas; and,

3. The maxim, debitor non presumitur donare, the late Mr. Dundas having settled provisions on the pursuers beyond what he was bound to do by his marriage-contract.

To this it was answered,

1. That the claim was not founded on the promissory note, but on the whole circumstances of the case, so that the sexennial prescription did not apply; and as to the long prescription, that the debt was kept up,—1. By Mr. Dundas' acknowledgment in the bond to Miss Lyon, the debt mentioned there being clearly the same with that for which the promissory note was granted;—2. By the acknowledgment of the trustees on discovery of the note and appointment, which had undoubtedly been lodged with Lord Melville, to be held for behoof of the pursuers;—3. By the payment of the 'interest' to Miss Lyon;—and, 4. By the obligation come under by the tutors of the defender, on the estate being reconveyed by the trustees, to procure and report discharges of all outstanding debts, the one in question being specially mentioned, which obligation was not only not objected to by the defender within the quadriennium utile, but homologated by him by the payments made to Miss Lyon as 'interest' of the debt.

2. That Miss Lyon could not discharge a debt conveyed by her brother to the pursuers; and,

3. That the maxim, debitor non presumitur donare, did not apply to the case of provisions by a father to his children, and especially could not apply here, where the provisions were so inadequate to the station of the parties, and where the bond of provision and the document of debt had evidently been deposited by the father with a third party, to be held for behoof of his daughters.

The Lord Ordinary reported the case on informations, and the Court, by a majority, decerned against the defender for payment of the debt in question.

LORDS JUSTICE-CLERK, GLENLEE, and PITMILLY were of opinion that under all the circumstances, especially that of the defender's tutors becoming bound, on the reconveyance of the estate, to procure discharges of the outstanding debts, this £600 being expressly mentioned as one of them, the debt had been kept up against the present defender; and that the maxim, debitor, &c. did not at all apply; but Lord Alloway entertained great doubts on both points.

Pursuers' Authorities.—(3.)—1. Stair, 8. 2; 4. Stair, 45. 17; 3. Ersk. 3. 93; Winrahame, Dec. 15. 1668, (11433); Kunniergham, Feb. 17. 1731, (11438); Ord, Dec. 1685, (11492); Spaden, Jan. 14. 1819, (F. C.); Duguid, Dec. 11. 1818, (not rep.)

Defender's Authorities.—(3.)—Fife, Nov. 29. 1751, (2309); Matheson, Nov. 28. 1766, (11453); Greig, Feb. 19. 1768, (11454.)

J. HOPE, W. S.—R. CAMPBELL, W. S.—Agents.

No. 373.

J. CAMPBELL Jun. W. S. Pursuer.—*More—Hamilton.*
J. SMITH, Defender.—*D. of F. Moncreiff—J. M. Bell.*

Bill of Exchange.—Non-onerosity of indorsee only proveable by writ or oath.

June 12. 1827.
2D DIVISION.
Ld. Mackenzie.
B.

THIS was an action at the instance of Campbell, writer to the signet, for payment of a bill of exchange drawn by Bell and Sword, merchants in Leith, upon and accepted by the defender Smith, and which had been indorsed by Bell and Sword to Campbell, who was their agent, and who discounted, and was afterwards obliged to retire the bill, Bell and Sword having become bankrupt. Smith in defence pleaded non-onerosity on the part of Campbell, and attempted to assimilate this case to that between the latter and Dryden, mentioned ante, Vol. III. No. 230; but the circumstances being different, and Smith having failed to establish his defence by the writ of party, the Lord Ordinary decerned against him, and the Court adhered.

In reference to the case of Dryden it was observed, that the judgment of the Court in that case amounted to this, that if a party's accounts show that the money paid by an agent to retire a bill, in which his constituents were obligants, was truly advanced out of his constituents' money, and that he had acted merely as an agent or hand to transfer the money, the circumstance of his name being on the back of it as indorsee would not entitle him to insist on the defence, that he could only be put to his writ or oath.

CAMPBELL and TOD, W. S.—J. T. MURRAY, W. S.—Agents.

No. 374.

J. ELDER, Suspender.—*Sandford.*
A. JACK, Charger.—*Skene—Matheson.*

Process—Witness.—Held that a party who had allowed a witness to be examined without objection, was not afterwards entitled to allege that he had an interest in the cause, and so was incompetent,—he being aware of the objection at the time of the examination.

June 13. 1827.
1ST DIVISION.
Ld. Corehouse.
S.

JACK, a writer in Glasgow, brought an action against Elder before the Sheriff of Lanarkshire, alleging that he had been employed by him to act as agent for his son in certain judicial proceedings, and concluding for payment of his account. Elder having denied the employment, a proof was allowed, and one

Taylor was adduced as a witness, and his evidence admitted without objection. The Sheriff having decerned against Elder, he brought a suspension, in which he alleged,

1. That Jack had not taken out his attorney license during the course of the proceedings for which he claimed payment; and,

2. That Taylor was either a partner of Jack, or was his employer, and therefore, having an interest in the cause, was an incompetent witness.

To this it was answered,

1. That the objection as to the attorney license was removed, by Jack having availed himself of the privilege conferred by the 7th Geo. IV. c. 44; and,

2. That the allegation as to Taylor was entirely new, and had not been made in the Inferior Court; that Elder had not objected to his being received as a witness, and that he must have been as fully aware at the time of his examination as he now was of the truth of his allegation; besides, it was contradictory of itself, because Taylor could not both be employer and partner; and that at all events he ought not to be allowed a proof of it without paying the whole previous expenses.

The Lord Ordinary 'repelled the third reason of suspension, 'viz. 'that the charger is barred by the Stamp Act from recover-"ing or prosecuting for any charges of the kind, in consequence "of being unlicensed;' and in respect it is now alleged that one of 'the two persons examined on the part of the pursuer in the 'Inferior Court is an incompetent witness, on account of his 'having interest in the cause, remitted the cause to the Sheriff, 'with instructions to recall the interlocutors brought under sus-'pension, to allow a proof of said allegation, and to do otherwise 'in the cause as to him shall seem just; but found no expenses 'hitherto incurred due to either party.'

Elder acquiesced in the first part of this judgment; but Jack having reclaimed, the Court altered, and found the letters orderly proceeded.

The Judges were of opinion, that from the statements made in the record by Elder, he must have been fully aware of the objection to Taylor at the time when he was adduced as a witness, and that therefore he was not now entitled to plead that objection.

A. M'Intyre, S. S. C.—J. Macdonell, W. S.—Agents.

No. 375.

P. Hay, Esq. Pursuer.—*Forsyth.*
J. Henderson and Others, Defenders.—*Skene—Marshall.*

June 13. 1827.
1st Division.
Lord Eldin.
D.

This was a special case, in which the Lord Ordinary decerned against the defenders; but the Court altered, and remitted to inquire into certain facts.

D. and A. Thomson, W. S. Agents.

No. 376.

R. Dunlop, Advocator.—*Buchanan—A. M'Neill.*
J. and J. Reid, Respondents.—*Robertson—Cowan.*

Bill of Exchange.—Held, that there being no lawful evidence of fraud against the holder of a bill, he is entitled to the ordinary privileges of a holder.

June 13. 1827.
1st Division.
Lord Eldin.
S.

The respondents presented a summary petition to the Sheriff of Ayrshire, stating that they had entered into a transaction with William Dunlop, by which they had accepted a bill for £86. 10s., drawn by and payable to him, for the purpose of having it discounted, and the proceeds applied to payment of the share of a vessel which they had purchased; that William Dunlop had fraudulently indorsed it to Robert Dunlop, who was fully aware that he held it for the above purpose; and therefore they concluded that Robert Dunlop should be ordained to deliver up the bill. In defence, Robert Dunlop stated that he was a creditor of William for £15. 10s.; that he had received the bill in payment of that sum, and that the balance was to be paid to William; that he was willing to pay that balance, but that he was an onerous holder to the extent of £15. 10s. The Sheriff, after ordaining him to undergo a judicial examination, to which he submitted, decerned against him for restitution of the bill.

An advocation was then brought by Robert Dunlop, in which he maintained, That as he was a holder of the bill, the alleged non-onerosity and mala fides could only be proved by his writ or oath; that it was not relevant to allege that William Dunlop had been guilty of a breach of trust, and that the judicial examination was incompetent.

To this it was answered, That as a relevant averment of fraud had been made, parole proof, and consequently a judicial examination, were competent; and that there was sufficient evidence to establish the fraud.

The Lord Ordinary altered, advocated the cause, and assoilzied Dunlop; and the Court adhered.

The Judges were of opinion that there was no legal evidence of the allegation of fraud, and therefore that Dunlop must be entitled to the ordinary privileges of the holder of a bill.

DUNLOP and LAIDLAW, W. S.—G. M'CLELLAND, W. S.—Agents.

J. TAYLOR, Advocator.—*D. of F. Moncreiff—Sandford.*
G. WIGHT, Respondent.—*More.*

No. 377.

Joint Obligation—Agent and Client.—Circumstances in which a joint obligation to be at the expense of carrying on certain actions for mutual behoof was held to be limited to the expense of the actions while conducted by an agent specially appointed in the agreement, and not to extend to the expense incurred in the actions after the renunciation of that agent, and the appointment of another.

June 14. 1827.

2D DIVISION.

Ld. Mackenzie.

B.

MR. MILL, farmer of the post-horse duties for Scotland, having claimed from the proprietors of saddle-horses let out to hire the mileage post-horse duty in addition to the assessed tax paid for these horses, several horse-hirers in Edinburgh and Glasgow combined to defend, at their joint expense, any actions that might be raised for the purpose of trying their liability for this charge. A meeting was accordingly held for this purpose, when the following minute was agreed to:—'2d March 1818.—We, the subscribers hereof, hereby nominate and appoint Samuel Wordsworth, Esq. as preses, and James Scott &c. as a committee to regulate as to defending the actions raised or to be raised against any of our number for bringing saddle-horses under the post-horse duties; and we, conjunctly and severally, become bound for any expenses that may be incurred in any of the said actions, to be paid by each of us in proportion to the number of horses specified opposite to each of our signatures.' This minute was subscribed, among others, by the respondent Wight, a stabler in Edinburgh, who was then possessed of one saddle-horse, which he let out to hire, but which he only kept for about a twelvemonth afterwards. It did not appear that Wight had attended the general meeting at which this minute was agreed to, or that he subsequently attended any meetings of the association; but he subscribed a regular deed of agreement, which, after stating the purpose of the association, proceeded thus:—'From these and various other reasons and causes, we hereby covenant and agree, as we have hereby covenanted and agreed, to enter into the present agreement, for the purpose of defending, at a joint expense, all actions raised or to be raised against any one or more of our number by the said John Mill, or any other lessee of the post-horse duties for the time being, with the view or intention of making saddle-horses liable in duty under the post-horse duty

'acts, when let out either by time, by distance, or in any other 'way whatever, otherwise and always excepting when let out in 'posting within the true intent and meaning of the foresaid acts 'of Parliament; and for the forwarding these our views and in-'tentions, and for the more sure and ready completion of our 'wishes in opposing the foresaid actions, we hereby agree to no-'minate and appoint, as we have hereby nominated and appoint-'ed, Samuel Wordsworth &c. as a committee to regulate as to 'what actions are to be carried on at our joint expense, and also 'to give instructions to the agent appointed or to be appointed 'for defending the said actions.' The deed also contained the appointment of an agent in the following terms:—'We having 'faith in the ability of Mr. Charles Murdoch Adair, writer in 'Edinburgh, in his capacity as agent, hereby nominate and ap-'point, as we have hereby nominated and appointed *him* to be 'our sole agent for defending or carrying on actions raised or to 'be raised against any of our number with the intentions afore-'said, in whatever way may seem most expedient to a majority 'of the committee at any meeting regularly called by the said 'Charles Murdoch Adair, which we hereby empower him to do 'as the convener hereof, to which situation of convener and secre-'tary to the said committee he is hereby virtually appointed; 'and we hereby grant power to and authorise the said committee 'to receive all accounts due by us to the said Charles Murdoch 'Adair, both as secretary and convener to the committee, and as 'agent in the foresaid actions, with power also to them to audit 'and pay the same; and we jointly and severally become bound 'in payment of all sums they may find due to the said Charles 'Murdoch Adair as aforesaid, in the same respect as if we had 'each severally acknowledged the same to be due.' And it concluded as follows:—'We hereby also covenant, agree, and bind, 'as we have hereby covenanted, agreed, and bound ourselves, 'conjunctly and severally, for all expenses to be incurred in con-'sequence of this agreement, or which has been incurred in con-'sequence of any other agreement entered into or to be entered 'into for the purposes aforesaid, we paying the said expenses in 'proportion to the number of horses specified opposite to each of 'our signatures; it being always understood and agreed, that in 'case of any one or more subscribers paying more than their due 'proportion of the expenses incurred or to be incurred, that they 'shall have due recourse on the others, but in so far only as their 'share exceeds the rest.'

Several actions having been raised by Mr. Hill for payment of the post-horse duties against parties to this agreement, the de-

fence was conducted by Mr. Adair in terms of the above deed; but after considerable procedure had taken place in these actions, Mr. Adair being obliged to leave Edinburgh, intimated to the committee that he was under the necessity of giving up the management of them. On this a meeting was called for the purpose of appointing a new agent to carry on the depending processes, and at this meeting the advocator Mr. Taylor was nominated agent and secretary in place of Mr. Adair. The respondent Wight did not attend the meeting when this appointment was made, and he stated that he had refused to subscribe a minute sanctioning it when requested to do so by the committee; but he did not aver that he had disclaimed the actions, or intimated that he would no longer hold himself liable for the expense of carrying them on. Shortly after Mr. Taylor's appointment, an assessment of four guineas for each horse was laid on by the committee, (in virtue of powers contained in the deed of agreement,) to be applied in payment of the expenses already incurred. Of this Wight paid two guineas without objection; but when the remaining two guineas were demanded, he at first refused to pay, but on an action having been raised against him by the advocator Taylor before the Sheriff Court, he paid the amount. In the mean time the actions went on, and additional expense was incurred to an extent which, when the matter was finally concluded, rendered a contribution of twelve guineas for each horse necessary. Wight having refused to pay this, Taylor, as treasurer and secretary of the association, raised an action against him before the Sheriff of Edinburgh, which was met by the defence, That Wight had only agreed to become bound to pay such expenses as should be incurred by Mr. Adair, but not such as should be incurred by any future agent who might be nominated. The Sheriff appointed Taylor to prove that Wight had remained a member of the association after Mr. Adair ceased to be agent, and on his failure to lead any evidence other than the production of the original minute and deed of agreement, the Sheriff assoilzied Wight. Taylor thereupon brought an advocation, in which it was contended, That by subscribing the original minute and subsequent deed of agreement, Wight had bound himself not merely to Mr. Adair personally, the employment of whom was not the object of the agreement, but to concur in the joint defence of certain actions for the mutual behoof of himself and the other subscribers; that these actions having been accordingly raised, he continued liable in the expense incurred until a disclamation on his part, and consequently that it was incumbent on him to prove a disclamation, (which he did not, however, allege,) and not on Taylor to prove

his remaining a member of the association, which he necessarily did till he expressly withdrew; and further, that by the two payments to Taylor he had homologated his appointment as agent.

To this it was answered, That the deed of agreement, by its very terms, limited the responsibility of the subscribers to such expenses as should be incurred by Mr. Adair, and by him alone; and that, so far from homologating the appointment of Taylor, the refusal on the part of Wight to subscribe a minute to that effect, and the withholding payment of the two guineas till an action was raised, amounted to a virtual withdrawal from the association, while the money then paid was (according to Wight's allegation) applicable solely to the expenses incurred by Mr. Adair.

The Lord Ordinary remitted simpliciter, and the Court, by a majority, adhered.

Lord Alloway.—I entertain great doubts of this interlocutor. When a number of persons agree for the joint purpose of carrying on a law-suit, I think that, if the action be raised, each must continue bound until he positively and expressly withdraws. Here there was a written agreement for the benefit of all the subscribers, each being entitled to be defended if attacked, the rate of liability being settled; and is it possible to say that the circumstance of the agent employed going abroad was to dissolve the association, and stop the proceedings in actions already commenced, although certainly each person had a vote in the appointment of his successor? I cannot distinguish this case from those of Spottiswoode, Dewar of Vogrie, and Kerr.

Lord Justice-Clerk.—The agreement here is very special, and seems confined to actions to be conducted by Charles Murdoch Adair, who is appointed not only agent, but convener of the committee. It is just on the definite terms of that instrument that I do not think it extended to expenses incurred by any other agent the committee might appoint; and the real evidence of the case shows that this was the understanding of the committee, as they called on the individuals who had subscribed the agreement to concur in the appointment of Mr. Taylor. A question is therefore raised here quite apart from the cases of Spottiswoode &c., where the obligation was to carry on a common object, and not to employ a particular person. I cannot, therefore, think that the Sheriff was wrong in calling on Taylor to show that Wight consented to be responsible after Mr. Adair ceased to be the agent; and as he will not undertake that proof, it comes to the general point, as to which I am of opinion that the obligation was confined to the expenses to be incurred by the particular individual appointed agent. I do not differ

from Lord Allowy on any general principles; but, on the specialties of this case, I think the Lord Ordinary's interlocutor is right.

LORDS GLENLEE and PITMILLY concurred.

Advocator's Authorities.—Spottiswoode, June 21. 1786, (11605,) aff. in H. of L.; Kerr, June 24. 1823, (ante, Vol. II. No. 396.)

J. TAYLOR,—G. STEDMAN,—Agents.

J. M'DONALD, Pursuer and Suspender.—*A. M'Neill.*
W. DENNY, Defender and Charger.—*Jameson.*

No. 378.

Mandate.—Circumstances in which the owner of a small vessel held not liable for furnishings made on the orders of two men employed to navigate her, contrary to his instructions.

June 14. 1827.

2D DIVISION.

Lord Medwyn.

F.

THIS was a reduction of a decree of absolvitor, with expenses, pronounced by the Water Bailie of the Clyde in an action at the instance of M'Donald, a sailmaker in Glasgow, against Denny, shipbuilder in Dumbarton, for payment of the price of a set of sails furnished for a wherry belonging to him, and also a suspension of a charge for the expenses. The facts, as brought out in evidence in the Inferior Court, are fully stated in the following interlocutor of the Lord Ordinary, to which the Court adhered:—

'Finds that the defender employed two of his carpenters, at a 'time when he had little work for them as such, to navigate a 'wherry in the Clyde, and accordingly they made a few trips be- 'tween Dumbarton and the Broomielaw: Finds that M'Millan, 'one of these carpenters, was the master, and was empowered 'by the defender to order from M'Pherson, a sailmaker, with 'whom the defender had formerly dealt, two second-hand sails 'for the use of the wherry: Finds that Stewart, the other lad, as- 'sumed the charge of executing this order, but, instead of find- 'ing out M'Pherson, he gave the commission to the pursuer, and, 'as he admits himself, 'thinking that he was serving the de- "fender," took it upon him to order two new sails, notwithstand- "ing of what M'Millan said,' who had observed at the time that 'the defender would grudge new sails:* Finds that when the 'new sails were furnished, M'Millan declined to receive them

* This observation M'Millan deponed to have spoken in the pursuer's presence in a loud voice; and it also appeared in evidence that the pursuer, when asked by the men if there was a M'Pherson, a sailmaker at the Broomielaw, had answered that there had been a person of that name a sailmaker there, but that he had left the place; while, in point of fact, there was a M'Pherson, a sailmaker at the Broomielaw, who had carried on the business for fourteen years.

'at the Broomielaw, and refused to sail with the wherry to Dumbarton, which was accordingly navigated by Stewart alone; and the defender also at Dumbarton immediately rejected the sails, as not being such as he had authorized to be purchased: Finds, that both at the delivery of the sails, and afterwards when they were rejected, the pursuer treated with Stewart as his employer: Finds, that the sails were neither ordered nor furnished in terms of the commission given by the defender to M'Millan, and that the defender is not bound by the unauthorized proceedings of one of the seamen who took it upon him to act in this matter, as he immediately disclaimed his actings, and this disclamation was communicated to the pursuer by Stewart, when a proposal was made that he should take the sails upon himself. Upon these grounds, finds that the pursuer can have no claim against the defender; therefore, in the *suspension* finds the letters orderly proceeded, and in the reduction repels the reasons of reduction, assoilzies the defender, and decerns.'

W. GUTHRIE,—C. FISHER,—Agents.

No. 379.

J. KER, W. S. Pursuer.—*D. of F. Moncreiff—Gillies.*
MAGISTRATES of KIRKWALL, Defenders.—*Cockburn—Marshall.*

Triennial Prescription.—Held,—1.—That cash advances made by a law agent do not fall under the triennial prescription;—but,—2.—That his proper business account does.

June 15. 1827.

1ST DIVISION. Lord Meadowbank. H.

THE pursuer, as assignee of the late Charles Innes, writer to the signet, and of Innes and Handyside, writers to the signet, brought an action, in 1822, against the Magistrates of Kirkwall, for payment of certain accounts terminating in 1802. These accounts consisted, first, of disbursements in cash, on behalf of the burgh, by Mr. Innes; and, secondly, of claims for remuneration for professional business.

In defence, the Magistrates pleaded,

1. That part of the cash advances were unvouched; and that, as they were made by a law agent, and formed part of his business account, they fell under the triennial prescription; and,

2. That the business accounts were prescribed; and further, that it appeared that they had not been incurred by the burgh, but by Sir Thomas, afterwards Lord Dundas, who was interested in the politics of that burgh, and for whom Innes and Handyside acted as agents.

To this it was answered,

1. That the cash advances were completely vouched by the evidence in process, and could not be affected by the triennial prescription; and,

2. That it was also established that the business had been performed on account of the burgh, and that although the treasurer kept no books, yet, from the accounts in his possession, it did not appear that they had ever been paid; and therefore this was to be considered as equivalent to the writ of party, and sufficient to establish the subsistence of the debt.

The Court, on the report of the Lord Ordinary, 'sustained 'the defence of prescription as to all the business accounts pur-'sued for, and to that extent assoilzied the defenders from the 'conclusion of the present action; but found that the plea of 'prescription does not apply to the cash advances, and remitted 'to the Lord Ordinary to proceed accordingly; and found no 'expenses due to either party.'

Pursuer's Authorities.—Dickson, July 5. 1681, (11090); Watson, Feb. 21. 1711, (11095); Donaldson, Jan. 15. 1766, (11110); Muirhead, June 30. 1748, (2506); Leslie, Nov. 15. 1808, (F. C.)

KER and DICKSON, W. S.—J. and C. NAIRNE, W. S.—Agents.

W. GIBSON, Pursuer.—*Miller.*
D. STEWART, Defender.—*Cuninghame.*

No. 380.

Process.—Incompetent to remit a cause from one Division of the Court to another, merely on account of its connexion with a cause which had formerly depended in that Division.

June 15. 1827.
2D DIVISION.

AFTER the action against the defender Stewart at the instance of Gibson, as partner of William Gibson and Company, mentioned ante, Vol. I. No. 425, had been dismissed by the Second Division in respect of defective instance, he raised a new action relative to the same matter before the First Division. In defence against this action it was pleaded, inter alia, That the former judgment of the Second Division formed a res judicata; and on its coming before the Inner-House of the First Division, their Lordships, of consent, remitted it to the Second Division, 'in respect 'of the connexion of the present question with another case lately 'depending before the Second Division, and of the proceedings 'had therein, as well as the arguments founded thereon;' but the Second Division, 'in respect there is no case depending in this 'Division to which this action can be remitted ob contingentiam,' remitted it back to the First Division.

Their Lordships were agreed, that except in the cases of contingency to a depending process, where remits were authorised by act of Parliament, it was incompetent to send a case from one Division to the other on the ground of connexion with a cause formerly depending.

J. MACKENZIE, Agent.

No. 381.

A. GOURLAY, Pursuer.—*Sol.-Gen. Hope—Boswell.*
D. STRATON, Defender.—*Cowan.*

Sequestration—Agent and Client.—An agent in a sequestration held not responsible for neglect in the performance of duties proper to the trustee; and Observed, that the agent could not be in any shape recognised by the Court as an officer in the sequestration.

June 15. 1827.

2D DIVISION. Ld. Mackenzie. B.

THE late William Bisset having been in 1812 elected trustee on the sequestrated estate of John Peebles, distiller at Stars of Forneth, appointed the defender Straton, a writer in Perth, to be agent in the sequestration. Bisset in many respects neglected the provisions of the act of Parliament, and at his death, which happened in 1816, he left the estate in great confusion, with a considerable part of his intromissions unaccounted for. Gourlay, the pursuer, having been then elected trustee in his place, raised an action of count and reckoning against his representatives, to which he also called Straton, the agent in the sequestration, concluding against him on the ground, that as Bisset was not a man acquainted with business, it was the duty of Straton to have taken care that the provisions of the statute were properly followed out, and that he himself had intromissions with the funds of the estate.

To this it was answered by Straton, That his only intromissions were of debts due to the estate, which he had been employed to recover by means of legal diligence, and it was not alleged that he had failed to account for these; while, as to the neglect and defalcation on the part of Bisset, the trustee, that he alone and his representatives were liable; but that no claim could lie against the agent, who had nothing to do with the management of the estate.

The Lord Ordinary, while he decerned against the representatives of Bisset for the balance unaccounted for by him, and refused to allow any commission to be deducted, assoilzied Straton, and found him entitled to expenses. In the mean time Straton had raised an action against Gourlay for payment of the account incurred to him as agent, amounting to £83, of which £13 was

taxed off by the Auditor. This action Gourlay resisted on the same grounds on which he founded his own claim against Straton; and he contended that, at all events, as £12 had been taxed off, the latter was not entitled to expenses of process. The Lord Ordinary, however, decerned in favour of Straton for the balance due of the account as taxed by the Auditor, with expenses; and the Court unanimously refused reclaiming notes on the part of Gourlay in both processes.

LORD JUSTICE-CLERK.—These papers raise the question, whether, when creditors appoint an unfit person as trustee, they are entitled to look to the agent as responsible for the proper management of the estate. If that were a part of our bankrupt law, this person's conduct would deserve much consideration; but I have always discountenanced the idea of recognising the agent as an officer in a sequestration. I cannot hold an agent to be a necessary person in a sequestration;—the less litigation, and the less use there is for an agent, the better for the estate. The Court, therefore, will not recognise agents in the character here sought to be imposed on them, and the Lord Ordinary's interlocutor must consequently be adhered to.

The other Judges concurred.

Pursuer's Authority.—Young, March 1. 1827, (ante, Vol. V. No. 251.)

D. GRAY, S. S. C.—DONALDSON and RAMSAY, W. S.—Agents.

Mrs. JEAN BUCHANAN and HUSBAND, Pursuers.—*Skene—Ivory—Speirs.* No. 382.

CORBETT, BORTHWICK, and COMPANY, and Trustees, Defenders.—*Sol.-Gen. Hope—Dundas.*

Trustee—Expenses.—Trustee for a bankrupt litigant not entitled, in sisting himself as party to the process, to insert a qualification that he shall not be liable for the expenses.

June 15. 1827.

2D DIVISION.

Ld. Mackenzie.

M'K.

THIS was an action at the instance of Mrs. Buchanan for payment of a promissory note for £1800 by Corbett, Borthwick, and Company, of which concern her son was a partner; and the defence was, that she had agreed to accept of her son as sole debtor. The defenders, however, having failed to substantiate this averment, the Lord Ordinary pronounced an interlocutor decerning against them, with expenses. Against this interlocutor the defenders gave in a reclaiming note; but shortly afterwards they became bankrupt, and conveyed their estates to trustees for behoof of their creditors. When the cause was put out for advising, the trustees craved to be allowed to sist themselves, under a reservation that they were not to be liable for

ling on the Act of Sederunt 1756, and concluding that Munro should be ordained to find caution to pay the arrears of rent, and also the future rents, during his continuing in possession; and failing his doing so, that he should be decerned to remove from the farm. Munro found caution for the future rents; but having denied that the arrears were owing, he declined to find caution. The Sheriff, being satisfied that these arrears were due, ordained him to remove.

Of this judgment he brought an advocation, and contended,

1. That the Act of Sederunt 1756 had no reference to verbal leases, nor to such leases as were continued from year to year by tacit relocation; and therefore that an action of removing, founded on an irritancy created by that act, was incompetent; and,

2. That although the rent was originally £16 per annum, yet it had been subsequently reduced in amount, and any arrear was more than extinguished by counter claims.

To this it was answered,

1. That the Act of Sederunt was equally as much applicable to a tenant possessing on a verbal lease, as to one who possessed on a written lease; and that a landlord, who has allowed a tenant to possess for a series of years by tacit relocation, instead of requiring a written lease to be executed, was entitled to avail himself of the benefit of the Act of Sederunt; and,

2. That as it was admitted that the rent was originally £16, and there was no evidence of the alleged reduction, nor of the counter claims, the judgment of the Sheriff was well founded.

The Lord Ordinary repelled the reasons of advocation, and remitted simpliciter; and the Court adhered.

Lord President.—I see no reason why the Act of Sederunt should not apply to this case as much as to that of a written lease. Where a tenant possesses from year to year, he may no doubt be removed at the end of any one year; but if he has incurred arrears, and resist an action of removing, there appears no incompetency in ordaining him to find caution for these arrears, and for the rents which may arise during his subsequent possession; and failing his doing so, to decern him to remove. Accordingly the Act of Sederunt is daily applied to leases which are about to expire.

The other Judges concurred.

L. Mackintosh, S. S. C.—T. M'Kenzie, W. S.—Agents.

No settlement having been obtained of these reserved items, the pursuers, in 1814, raised an action against David Graham before the Sheriff of Stirlingshire. After considerable procedure, in the course of which a forged receipt for the price of the cow and hogs was lodged, and afterwards withdrawn from process, the Sheriff found David Graham liable to implement his letter by procuring a submission of the items in question. Both parties having advocated, the Lord Ordinary assoilzied David Graham; but the pursuers reclaimed against his Lordship's judgment, and at the same time raised a supplementary action, calling both John and David, who were now the only surviving trustees of the deceased Mr. Graham. In this supplementary action a record was made up, and the case reported by the Lord Ordinary to the Court, who took up both actions together. For David it was pleaded, That his letter did not imply any obligation on himself, but merely that the discharge should be no bar to the pursuers following out any proceedings against John Graham for recovery of the items reserved; and for John it was contended, That his brother had no power to bind him; and although the pursuers were entitled to have count and reckoning with the trustees, they were not entitled to demand from him, as an individual, any sum received by him from the trustees, to whom he was ready to account, and against whom he had sufficient counter claims to set off against the items in question. The Court recalled the interlocutor of the Lord Ordinary in the advocation, conjoined it with the supplementary action, found that both defenders were accountable under David Graham's letter, and remitted to the Lord Ordinary to proceed accordingly.

W. Renny, W. S.—G. Dunlop, W. S.—W. Dickson, W. S.—Agents.

J. Munro, Advocator.—*Jeffrey—A. M'Neill.*
P. Brown, Respondent.—*Jameson—Matheson.*

No. 384.

Landlord and Tenant—Act of Sederunt 14th Dec. 1756.—Held that an action of removing, founded on the irritancy of the above Act of Sederunt, as to being in arrear of two years rent, is competent against a tenant possessing under a verbal lease from year to year.

June 16. 1827.

1st Division. Lord Eldin.

In 1810 Munro obtained a verbal lease for one year of the farm of Balnafoi on the estate of Culcairn from the factor of certain trustees, who held possession of the estate pending a competition for it. He continued to possess by tacit relocation for several years; but having incurred an arrear of more than two years rents, Brown, who was appointed judicial factor on the estate, brought an action before the Sheriff of Ross-shire, libel-

ling on the Act of Sederunt 1756, and concluding that Munro should be ordained to find caution to pay the arrears of rent, and also the future rents, during his continuing in possession; and failing his doing so, that he should be decerned to remove from the farm. Munro found caution for the future rents; but having denied that the arrears were owing, he declined to find caution. The Sheriff, being satisfied that these arrears were due, ordained him to remove.

Of this judgment he brought an advocation, and contended,

1. That the Act of Sederunt 1756 had no reference to verbal leases, nor to such leases as were continued from year to year by tacit relocation; and therefore that an action of removing, founded on an irritancy created by that act, was incompetent; and,

2. That although the rent was originally £16 per annum, yet it had been subsequently reduced in amount, and any arrear was more than extinguished by counter claims.

To this it was answered,

1. That the Act of Sederunt was equally as much applicable to a tenant possessing on a verbal lease, as to one who possessed on a written lease; and that a landlord, who has allowed a tenant to possess for a series of years by tacit relocation, instead of requiring a written lease to be executed, was entitled to avail himself of the benefit of the Act of Sederunt; and,

2. That as it was admitted that the rent was originally £16, and there was no evidence of the alleged reduction, nor of the counter claims, the judgment of the Sheriff was well founded.

The Lord Ordinary repelled the reasons of advocation, and remitted simpliciter; and the Court adhered.

LORD PRESIDENT.—I see no reason why the Act of Sederunt should not apply to this case as much as to that of a written lease. Where a tenant possesses from year to year, he may no doubt be removed at the end of any one year; but if he has incurred arrears, and resist an action of removing, there appears no incompetency in ordaining him to find caution for these arrears, and for the rents which may arise during his subsequent possession; and failing his doing so, to decern him to remove. Accordingly the Act of Sederunt is daily applied to leases which are about to expire.

The other Judges concurred.

L. MACKINTOSH, S. S. C.—T. M'KENZIE, W. S.—Agents.

J. STEEL, Pursuer.—*R. Bell.*
A. HAMILTON, Defender.—*A. M'Neill.*

No. 385.

June 16. 1827.

1ST DIVISION.
Lord Eldin.
H.

THIS was a question of accounting, in which the Lord Ordinary pronounced judgment against the defender, and the Court adhered.

J. JOHNSTON, S. S. C.—J. MALCOLM, S. S. C.—Agents.

ROBERTSON'S TRUSTEE, Petitioner.—*Skene.*
J. OUGHTERSON and Others, Respondents.—*Pyper.*

No. 386.

Sequestration—Bankrupt—Process.—Held,—1.—That an interlocutor of a Lord Ordinary, during vacation, in sequestration, is not final, but is reviewable by the Inner-House.—2.—That it is competent for the trustee on a sequestrated estate to apply by summary petition to the Court of Session for warrant to examine persons connected with the business of the bankrupt.—3.—That the partners in trade of the bankrupt (though not in the business in respect of which he was sequestrated) fall within the meaning of the Bankrupt Statute as persons connected with his business, and that they cannot escape examination by a dissolution of the partnership subsequent to the bankruptcy, though prior to the sequestration; and,—4.—That the trustee is not obliged to prepare interrogatories to be communicated to the parties prior to examination.

June 16. 1827.

2D DIVISION.
Lord Eldin.
F.

JAMES ROBERTSON was a partner of two separate companies of Robertson, Oughterson, and Company, and William Leitch and Company, carrying on business in Greenock. His affairs having become embarrassed, he called a meeting of his creditors in the end of June 1826, and was subsequently sequestrated as an individual in August following. A competition arose for the office of trustee; but, on this being determined by a judgment of the Court, the trustee confirmed presented an application to the Sheriff of Renfrewshire for the examination of the bankrupt 'and others 'connected with his business,' in terms of the 32d section of the Bankrupt Statute. The Sheriff granted a general warrant accordingly, and under it were cited James Oughterson and William Robertson,—the one a nephew, and the other a nephew-in-law of the bankrupt, and his partners in the concern of Robertson, Oughterson, and Company,—George Oughterson, a clerk in that house, and William Leitch, the bankrupt's partner in the concern of William Leitch and Company. The avowed object of the trustee in citing these parties for examination was to expiscate the circumstances attending an alleged fraudulent transference made by the bankrupt, within sixty days of his bankruptcy, of £1200 held by him as stock of the concern of William Leitch and Company in favour of his partners in the concern of Robert-

son, Oughterson, and Company. At the diet of examination, and before proceeding to take the deposition of the bankrupt, the trustee moved the Sheriff that Oughterson, one of the parties cited, should not be allowed to be present at the examination of the bankrupt. To this it was answered, That Oughterson, as a creditor, was entitled to be present, and that his own citation was illegal, as he did not fall within the description in the warrant of persons connected with the business of the bankrupt.

The Sheriff, 'in respect that Mr. Oughterson is ranked as a 'creditor of the estate, and does not appear to fall under the 'description of persons who might properly be cited under the 'general warrant for examination along with the bankrupt,' refused, hoc statu, to sustain the objection. Thereupon the trustee, taking it for granted that the Sheriff would not allow the examination of Oughterson and the other persons, did not press him to examine them, but immediately presented a petition to the Lord Ordinary on the Bills, (this being in time of vacation,) setting forth the circumstances, and praying for warrant to cite for examination before the Sheriff the persons formerly cited under the general warrant, and also George Robertson, brother of the bankrupt. To this petition answers were given in for Oughterson and others, who contended,

1. That the petition was incompetent, as the Bankrupt Statute only authorized an application for examination to be made to the Sheriff, but not to the Court, and as the trustee had not insisted for the examination of the respondents, or obtained a judgment from the Sheriff as to their liability to be examined.

2. That none of the parties sought to be examined were, within the meaning of the act, members of the bankrupt's family, or connected with his business, by which must be understood the business in respect of which he was sequestrated,—both the concerns of Robertson, Oughterson, and Company, and William Leitch and Company, being perfectly solvent; and besides, as to the former of these, the bankrupt had ceased to be a partner by advertisement in the Gazette in July 1826, prior to the date of the sequestration, though subsequent to the bankrupt having called a meeting of his creditors.

3. That, in particular, Messrs. Oughterson and Robertson, being creditors of the bankrupt, were not liable to be examined, the more especially as they were the parties to whom the transference which the trustee wished to challenge had been made, and consequently could not be subjected to a judicial examination for the purpose of cutting down their own rights.

4. That as to George Robertson, he had not been cited be-

fore the Sheriff, and could not competently be called on to appear in an application to the Court of Session in the first instance; and,

5. That at all events the parties could only be examined on special interrogatories previously prepared and approved of, and communicated to them beforehand.

The Lord Ordinary having granted warrant as craved, Oughterson and others presented a reclaiming note to the Court, to the competency of which it was objected by the trustee, That as by the Bankrupt Statute the Lord Ordinary in vacation was vested with the full powers of the Court, and as provision was made for a direct appeal to the House of Lords from his judgment, it must necessarily be final, and not subject to review by the Inner House. On this point the Court consulted the Judges of the First Division, and thereafter, with the unanimous concurrence of their Lordships, repelled the objection to the competency; but on the merits they unanimously refused the note, with expenses.

The Court, while they were of opinion that the application to the Court of Session was a competent procedure in the circumstances of the case—that the parties fell within the description contained in the 32d section of the Bankrupt Statute, and that special interrogatories previously prepared could not be required,—also held that it would be competent to any of the parties, when they appeared before the Sheriff, to plead any grounds which they conceived exempted them from the liability to be examined, or to object to the particular questions that might be put to them.

Respondents' Authorities.—M'Lea, Dec. 4. 1792; Bell's Cases, p. 75; M'Intosh, &c. Dec. 14. 1825, (ante, Vol. IV. No. 225.)

J. KENNEDY, W. S.—MACMILLAN and GRANT, W. S.—Agents.

R. C. BONTINE, Suspender.—*D. of F. Moncreiff—Speirs.* No. 387.
J. CARRICK, Respondent.—*Sol.-Gen. Hope—Donald.*

Entail.—Bill passed to try the question, whether an heir in possession of an estate under an entail was entitled to cut wood necessary to the comfort and amenity of the mansion-house.

THE respondent Carrick, wood-merchant at Balfron, purchased from Graham of Gartmore a considerable extent of growing timber on the entailed estate of Gartmore, and granted bills for the price. Graham shortly thereafter left the country, having executed a deed of trust for behoof of his creditors; and Carrick

June 16. 1827.
2D DIVISION.
Bill-Chamber.
Ld. Cringletie.
B.

having commenced to cut down the wood purchased by him, Bontine, the eldest son of Graham, and next heir of entail, presented a bill of suspension and interdict, on the ground that great part of the wood sold by his father was unripe and not fit for cutting, and that it included the old timber round the family burial-place and about the mansion-house, to the amenity and comfort of which it was absolutely necessary. The Lord Ordinary remitted to a land-surveyor to report whether any of the wood in question was unfit for cutting, and the cutting of which would render the mansion-house altogether uncomfortable. The surveyor accordingly returned a report, in which he pointed out a considerable number of trees which in his opinion ought not to be cut, as being necessary to the comfort and amenity of the mansion-house.

The Lord Ordinary passed the bill as to the trees pointed out by the surveyor, and refused it quoad ultra; and the Court refused a reclaiming note for Carrick, it being understood that caution was to be found by Bontine to the extent to which the bill was passed.

Lord Glenlee.—On the understanding that the bill is passed only on caution, I think it right that the question here raised should be tried. It is a question of great difficulty and nicety how far an heir of entail is limited in his powers of cutting wood; but it certainly is not so clear a point that he is under no limitation whatever as to warrant the refusal of the bill. If the bill be refused, the damage done will be irreparable; while, if passed, although Carrick be ultimately found entitled to cut the wood, he will be secured from loss in consequence of the delay by the caution to be found.

Lord Pitmilly concurred.

Lord Alloway.—I hesitate very much as to passing this bill. I do not say that it is impossible to bring such a case as might warrant the interference of the Court, though on general principles I doubt exceedingly the power of the Court to interfere. The only case on the point is that of Oxenford, and there the Court refused to prevent the wood from being cut. The case of Ellon is no authority to the contrary. I heard President Blair's speech in that case, and he proceeded entirely on this, that the Castle of Ellon was specially prohibited in the entail from being sold. The question as to the powers of liferenters does not at all apply, as an heir of entail is in no respect in a situation similar to a liferenter; that of a minister resembles it more nearly, and it has been found that a minister cannot be prevented from cutting trees on the glebe.

Lord Justice-Clerk.—We are not proposing to decide finally any point of law, but merely to pass a bill in order to try the question. The greater part of the wood sold remains unfettered by the interdict, and the question is confined to that wood which is said to be

necessary to the comfort of the house as a permanent residence; and as, on the one hand, the damage, if done, can never be repaired, while, on the other, no risk is run, since caution is to be found, I think it right that the question should be tried, whether an heir is entitled to cut wood of that description. In the case of M'Kenzie, although the matter was arranged by the parties, the views taken by the Court show that this is not so extraordinary an attempt as is supposed; and although the case of Oxenford stands in our books as an authority, yet, to a certain extent at least, it was trenched on by the decision in the case of Greenock. I admit that it is only in extreme cases that the Court can interfere; but when such do occur, I see no principle to prevent their interference. It is not necessary, however, to decide the point now, as we are only called on to pass the bill, sufficient precaution being taken to prevent the respondent suffering any loss.

Suspender's Authorities.—Lord Cathcart, (case of Greenock,) Jan. 31. 1755, (15403); Gordon, (case of Ellon,) Jan. 24. 1811, (F. C.); M'Kenzie, March 6. 1824, (ante, Vol. II. No. 713); Dickson, Jan. 24. 1823, (ante, Vol. II. No. 143); Tait, Dec. 2. 1825, (ante, Vol. IV. No. 196.)
Respondent's Authorities.—Sandford, p. 161; Hamilton v. Lady Oxenford, Feb. 16. 1755, (15408.)

KER and DICKSON, W. S.—W. MERCER, W. S.—Agents.

W. BAXTER, Suspender.—*Sandford—A. M'Neill.* No. 388.
R. EWART, Charger.—*Lothian.*

Lawburrows.—Judgment adhering to an interlocutor of the Lord Ordinary, which refused a bill of suspension of a charge on letters of lawburrows regularly obtained, presented on an allegation that the lawburrows had been taken out maliciously.

June 16. 1827.
2D DIVISION.
Bill-Chamber.
Ld. Mackenzie.
F.

N. W. ROBERTSON, S. S. C.—J. H. LOTHIAN, W. S.—Agents.

G. HENDERSON and A. SCOT, Suspenders.—*Skene—Marshall.* No. 389.
J. KER and H. JOHNSTON, Chargers.—*Jameson.*

Juratory Caution.—The agent for a bank having been charged under his bond for a balance appearing on a stated account, and a bill of suspension of that charge having been passed on juratory caution, the Court also passed on juratory caution a charge on one of the bills which formed an item in that stated account.

SCOT, the agent at Langholm for the Leith Bank, (of which the chargers Ker and Johnston are managers,) having fallen greatly in arrear to the bank, they used inhibition against him, and charged him on his bond of caution for the balance as ap-

June 16. 1827.
2D DIVISION.
Bill-Chamber.
Lord Medwyn.
F.

pearing on a stated account. Of this charge Scot presented a bill of suspension, which was passed by the First Division on juratory caution. The bank then charged him and Henderson on two bills, on which he was indorser and Henderson drawer, drawn by Henderson, and indorsed by Scot, both of whom presented a bill of suspension without caution,—Henderson, on the ground that he had received no notification of the dishonour by the acceptors,—and Scot, on the grounds on which the First Division had passed the bill of suspension of the charge on that bond, and that the bills formed items of the balance of the stated account for which he was charged under his bond. The Lord Ordinary passed the bill as to Henderson, but only on caution, and refused it as to Scot in respect of no caution. They reclaimed, and Scot contended, That the bank having tied up his funds by inhibition, and obtained security over them by the juratory caution in the suspension of the charge on the bond, could not demand full caution in this suspension, which was of a charge for an item really included in the general charge under the bond. The Court adhered as to Henderson, but as to Scot they remitted to pass on juratory caution.

R. W. NIVEN, W. S.—J. BISSET, S. S. C.—Agents.

No. 390.

M. CUNNINGHAM and Others.—*Robertson.*
Mrs. J. THOMSON and HUSBAND.—*Jeffrey—W. Bell.*

Competing.

Fee and Liferent—Clause.—Circumstances in which a parent was found to be a liferenter, and the children fiars.

June 19. 1827.
1ST DIVISION.
Lord Eldin.
D.

THE late John Thomson was proprietor of four different subjects in Lanarkshire and Linlithgowshire; and, with a view to settling his affairs, he disponed each of them to his four children, and delivered the deeds. In particular he disponed the lands of Tartravine to his daughter Jean Thomson, spouse of Robert Cunningham, under burden of his own liferent—of payment of one fourth part of his debts—of an annuity to his wife—and of several legacies. In the month of June 1816 Jean Thomson and her husband agreed to sell the subjects to one Veitch, and to give him an unencumbered title; but Thomson having refused to discharge the burdens, or to concur in the sale, Veitch brought an action of damages, in which he obtained decree.

In the mean while Thomson had resolved to settle his affairs by a trust-deed, and with that view he obtained reconveyance of the subjects which he had disponed to his children, with the ex-

ception of Tartravine. Accordingly, on the 20th of June 1816, he executed a trust-deed, by which, inter alia, he disponed his whole lands, including those of Tartravine, to trustees. These lands, he declared, were to be held by the trustees for his daughter and her husband in liferent, for their liferent use allenarly, and for the children of the marriage in fee.

To avoid being compelled to pay damages, Jean and her husband applied to Thomson to concur in the sale, and agreed that the price should be secured in such a way as he saw fit. Accordingly they wrote to him, that 'if you comply with the disposition, 'the money will be lodged with any person you choose, until the 'bond be wrote, and sixty days registered. We are under the neces- 'sity of disponing to him in terms of our promise, and it is certainly 'desirable that the whole should concur, and the money be proper- 'ly secured in the way you wish it.' To this he answered,—'After 'considering your letter of this date, and Robert Cunningham's, 'I agree to sign the disposition to Mr. Veitch, if the money is 'secured in the way mentioned in my letter to you of the 19th, 'and in terms of my settlement, which Robert agrees to by his 'letter of the 22d to you, and you to keep the disposition till the 'bond is wrote.' The lands were in consequence sold and conveyed to Veitch, and the price was then lent upon an heritable bond to a Mr. Gilchrist. This bond was taken payable to the trustees, to be held by them for behoof 'of the said John Thom- 'son, Margaret Thomson his wife, Jean Thomson, and the heirs 'of her body, and Robert Cunningham, according to their respect- 'ive interests of fee and liferent, for the uses and purposes and 'in manner expressed in a settlement executed by the said John 'Thomson, bearing date 20th June last (1816,) or as the same 'may be expressed in an additional trust to be executed by the 'said John Thomson, Jean Thomson, and Robert Cunningham.' Thereafter, on the 8th May 1818, John Thomson cancelled his trust-deed of settlement by cutting his signature from every page of it, and on the back of the last page he wrote the following doquet:—'As my whole heritable property, now and formerly, has 'been settled by separate and absolute conveyances nearly in the 'terms of the within deed and settlement, and as it is altogether 'useless and void by this conveyance, I hereby declare that I 'have torn my name from every page, and cancel this deed, that 'it may create no dispute or confusion in my family in all time 'coming.' On the 26th of June thereafter, he, together with the trustees, executed a revocation and discharge of the trust-deed, with this declaration:—'Declaring, however, that these pre- 'sents shall in no way prejudice any right or security standing in

'cording to the true intent and meaning thereof, and at any time 'to associate or to substitute any person or persons to assist 'them in executing said will, as they shall judge proper;' and he further declared, 'that the said executors, the Rev. Patrick 'Bryce, and my brother the Rev. John Aitkin, shall each of 'them be entitled to the sum of £100 sterling annually during 'their administration, and the said Mr. James Rodgers to the 'sum of ps. 8.1,000 annually during the said period, to com-'mence from the day of my decease.' By the ordonnance here referred to, it is required that the persons appointed executors shall appear before the proper Court of the island, and declare their acceptance of the office, and that if they fail to do so, the Court shall take the management of the estate into their own hands.

Mr. Aitkin afterwards came to England, where he died in 1815, leaving property to a large amount. A power of attorney was then executed by the Rev. Mr. Bryce and the Rev. Mr. Aitkin, the surviving executors, in favour of a Mr. Lang, who was resident in the island, by which they constituted him their 'lawful attorney for them and either of them, and in their or 'either of their names or name, or otherwise, to prove the said 'will of the said George Aitkin in any Court or Courts of the 'said island of St. Croix, or elsewhere in the West Indies, ac-'cording to the usual and accustomed manner in which wills are 'there proved and established, and for doing such act or acts as 'may be necessary, according to the forms and laws of the said 'island, for registering and enrolling the same will, in order and 'to the intent that full and complete dominion and command 'may be obtained over the estate and effects late of the said 'George Aitkin, situated, lying, and being in the said island of 'St. Croix, or any other island or islands, place or places, in 'the West Indies, and that the same may be regularly and duly 'obtained, recovered, received, and disposed of, and administered 'according to the laws, usages, and customs of such place or 'places, and the true intent and meaning of the will of the said 'George Aitkin: And further, after probate shall be granted or 'obtained as aforesaid, to act in and administer the affairs, estates, 'and effects late of the said George Aitkin in the said island of 'St. Croix, or elsewhere in the West Indies, in such and in the 'same manner, in all respects, as the said John Aitkin and 'Patrick Bryce, or either of them, could or might do if person-'ally present, and doing the same,' &c. In consequence of this authority, Mr. Lang applied for and obtained the sanction of the Danish Government by an appointment in these terms:—'Agree-'ably to the power of attorney given your from the surviving exe-

'cutors in the dealing of the deceased George Aitkin, you are 'hereby appointed executor and dealing-master, administrator, 'guardian, and curator in the said estate, as far as regards the 'property belonging to the deceased in the West Indies.' This was followed by an order of the proper Court, whereby Mr. Lang, in respect of the above appointment, was nominated executor of Mr. Aitkin.

In the mean while Mr. Bryce had, in the event of its being found that the will did not extend to personal funds in England, renounced the administration quoad them, and it was ultimately settled that it did not. Thereafter having died, his daughter, the pursuer, brought an action against the representatives of the testator Mr. Aitkin, concluding for payment of the £100 provided to him annually under the will.

In defence they maintained,

1. That as, by the law of the island of St. Croix, it was necessary that the executors should be resident on the spot, and there take the administration; and as the provision in the will was qualified with the condition of Mr. Bryce acting as administrator, and he had not done so in that island, and had renounced in England, the pursuer could have no claim; and,

2. That Mr. Lang was truly the nominee of the Court, and therefore his actings could not be regarded as those of the pursuer's father.

To this it was answered, That it could never have been the intention of the testator that the pursuer's father, who was a clergyman in Scotland, should go to St. Croix, and there act as administrator; that in appointing an attorney, who had, in virtue of the authority of Mr. Bryce, obtained himself nominated executor, and acted as such, he had done every thing in his power to comply with the will of the testator, and therefore the condition had been purified; and that the renunciation to act as administrator in England had been made only on the footing of the will not being applicable to effects situated there.

The Court, on the report of the Lord Ordinary, decerned in terms of the libel.

Lord Balgray. — It is perfectly plain that the testator could never have supposed that the Scottish clergymen whom he appointed as his executors should go personally and administer his affairs in St. Croix, and we must presume that he knew the law of the island where he resided. He must therefore have intended that they should act by means of an attorney. Accordingly they appointed Mr. Lang, who acted in virtue of their authority. It is clear, therefore, that the legacy is due.

Lord Gillies. — I am entirely of the same opinion; and besides it

will be observed, that the testator declares that the legacy shall be due from and after the period of his decease; so that, according to the plea of the defenders, it would not have been due, unless the executors had begun to act from that moment, which is absurd. The other Judges concurred.

J. Scott, S. S. C.—R. Rattray, W. S.—Agents.

No. 393. Lord Elibank's Trustee.—*Fullerton—Walker.*
J. and T. Hamilton.—*Cuninghame—Tait.*

Competing.

June 19. 1827.
2d Division.
Ld. Cringletie.
M'K.

Multiplepoinding—Interim Decree.—In a multiplepoinding raised in name of Thomas Hamilton in regard to the sum of £455, being the rent of a farm held by him under Lord Elibank, claims were lodged for his Lordship's trustee,—for James Hamilton, writer to the signet, on an indefinite claim founded on arrestments (objected to on various grounds) which had been used on the dependence of an action for delivery of certain articles, in which action warrant of delivery had been obtained,—and for Thomas Hamilton, the tenant, who pleaded certain vague claims of retention. The Lord Ordinary having granted an interim decree for £300 in favour of Lord Elibank's trustee, the Court adhered, with this variation, that the trustee should find caution to repeat in the event of the other claimants substantiating any preferable claim.

R. Roy, W. S.—J. Hamilton, W. S.—Agents.

No. 394. Rev. Dr. G. H. Baird, Suspender.—*Sol.-Gen. Hope—Marshall.*
Little's Trustees, Chargers.—*Murray—Jameson.*

Bill of Exchange — Sexennial Prescription — Oath. — Circumstances in which, although a party admitted that he had granted a promissory note, which was prescribed, and that he had not paid it, yet, having denied that it was ever intended to constitute a debt against him, was found not liable for the debt.

June 21. 1827.
1st Division.
Lord Eldin.
S.

In 1808, the suspender, who then taught the logic class in the University of Edinburgh, having taken an interest in William Craig, one of the students, requested the late Mr. Little, writer to the signet, to receive him as an apprentice. That gentleman having done so, and the suspender having agreed to be Craig's cautioner, indentures were executed, and on occasion of their being signed by the suspender, Mr. Little, on the 19th of August 1808, addressed to him this letter:—'Mr. Craig brings his indentures 'to be signed by you. As they contain a discharge of the ap-'prentice-fee of £130, it is right that I should have a voucher

'for that sum, and if agreeable to you, I shall take a joint pro-
'missory note from you and Mr. Craig, which can be paid at the
'young gentleman's conveniency.' A promissory note was accordingly granted by the suspender and Craig of the above date. The latter served a regular apprenticeship, and was admitted a writer to the signet; but he failed to pay the promissory note.

In 1818, and after the death of Mr. Little, his trustees raised an action against the suspender for payment of the debt, in which they obtained decree in absence, and having charged him upon it, he brought a suspension, in which he contended that the bill was prescribed, and that the debt could only be proved by his oath.

After a considerable litigation, the chargers made a reference to the oath of the suspender, and he thereupon emitted a deposition, of which the material part was in these terms:—'Being shown a
'promissory note, bearing to be dated 19th August 1808, promis-
'ing to pay the sum of £130 sterling to Mr. James Little, writer
'to the signet, or order, for the contents of which promissory
'note decree was pronounced against him by the Court of Session
'on 24th January 1821; and being desired to say whether the
'signature Geo. H. Baird, adhibited to the said note, is the sub-
'scription of the deponent, and was adhibited by him? depones
'that it is his subscription. Interrogated if said promissory note
'was granted to Mr. Little for the amount of the apprentice-fee
'of William Craig, whose name appears at the note, and whether,
'in the indenture of the said William Craig, to which the de-
'ponent was cautioner for Craig, the said apprentice-fee was dis-
'charged, and the said note at the same time delivered to the
'said Mr. Little? depones, that the note was granted for the
'said apprentice-fee, but he does not, at this distance of time, re-
'collect the date of its delivery. Depones, that it is most likely
'that he was cautioner in the indenture for the due performance
'of it, which he understands to mean the good behaviour of the
'young man in the fulfilment of his duty as an apprentice. In-
'terrogated if he ever paid the contents of the said note? de-
'pones that he never did, because, when he signed that bill, it
'was the deponent's perfect understanding that he was never to
'be called upon to make payment, and he did not consider it,
'therefore, as constituting a debt against him: That Mr. Little,
'in express terms, stated to the deponent that it was not to con-
'stitute any debt against him, and that he (the deponent) was
'neither to be understood to be liable for payment of it, nor
'ever to be called upon for payment of it; and the deponent
'added, that he remembered distinctly Mr. Little stating that

'he would in no circumstances, or at any future period of time, 'be called upon for payment of a farthing of it.' After giving a history of the circumstances under which the note had been granted, he deponed, 'That he and Mr. Little had repeated 'conversations upon the subject, both before and after the date 'of the indenture, and that Mr. Little always said that the de-'ponent's signing the promissory note for the apprentice-fee would 'have the effect of stimulating the young man's exertions to work 'it off; but Mr. Little never on any occasion gave the most 'distant hint that, in the event of Craig failing in those exer-'tions, he the deponent should be called upon for payment of 'that note. Interrogated whether he knows whether Mr. Little 'ever got payment from Craig of this note in the manner before 'stated? depones, that he never made any inquiry, as he did 'not conceive he had any thing to do with it. Depones, that 'he believes that Craig completed the period of his indenture.'

The Lord Ordinary found the oath negative, and therefore suspended the letters, and the Court adhered.

MACRITCHIES, BAYLEY, and HENDERSON, W. S.—MURRAY and INGLIS, W. S.—Agents.

No. 395.

C. COLQUHOUN, Advocator.—*A. M'Neill.*
J. and A. DUNN, Respondents.—*Gillies.*

June 21. 1827.
2D DIVISION.
Ld. Cringletie.
F.

Damages.—Action of damages by Colquhoun against Dunns before the Sheriff of Lanarkshire, for alleged malicious and illegal sequestration of furniture for the rent of a house. The Sheriff dismissed the action, the Lord Ordinary remitted simpliciter in an advocation, and the Court adhered.

C. FISHER,—J. THORBURN,—Agents.

No. 396.

T. BRUCE, Pursuer.—*Fullerton—Skene.*
J. C. BRUCE, Defender.—*D. of F. Moncreiff—More.*

Entail—Res Judicata—Acquiescence,—Held,—1.—That an heir of entail prohibited from selling, but having power to do so in consequence of a defect in the resolutive clause, and who sold the estate, was bound to reinvest a sum equivalent to the price in lands to be entailed in terms of the original entail.—2.—That a judgment in a question tried with the heirs of entail, as to the validity of a disposition to a purchaser, was not res judicata as to the heir's obligation to reinvest; and,—3.—That a substitute heir was not barred from insisting on the fulfilment of that obligation by a delay of nearly thirty years from the date of the sale.

June 21. 1827.
2D DIVISION.
Ld. Mackenzie.
M'K.

THOMAS BRUCE, one of the substitute heirs of entail of the estate of Tillicoultry, brought an action against James Carstairs Bruce, who, in consequence of the resolutive clause in the entail not extending to the prohibition to sell, had sold the estate, con-

cluding to have him ordained to reinvest the price, or a sum equivalent to it, in other lands, to be taken to the same order of heirs, and under the same conditions, as in the entail of Tillicoultry. As this case involved the same general question which occurred in that of Ascog * (which see,) the Court, on its being reported by the Lord Ordinary on informations, superseded consideration of it till judgment should be given in that case. When the decision was pronounced in it, this case was resumed; but the defender, without again discussing the general question of the liability of an heir under an entail such as the present and that of Ascog to reinvest the price after selling the estate, confined himself to certain specialties which did not occur in the case of Ascog, and which he contended were sufficient to entitle him to a judgment of absolvitor. The special circumstances on which the defender founded were these.—

He had succeeded to the estate of Tillicoultry in the year 1796; and for the purpose of having the question tried, whether he was entitled to sell the estate notwithstanding the entail, he sold and granted a disposition of certain parts of the estate to a friend, and then raised an action against the substitute heirs of entail, calling, among others, the present pursuer, and concluding to have it found that he 'had undoubted right to make the said 'sale, and to execute the foresaid disposition; and that he was 'not prevented from so doing by the foresaid deed of entail, or 'by any of the titles on which he possesses the foresaid lands; 'and that the said disposition executed by him is an effectual disposition to all intents and purposes.' This action was conjoined with a suspension on the part of the purchaser; and after considerable litigation with the substitute heirs of entail, the Court ultimately, 'in respect the resolutive clause in the entail does not 'apply to a sale of the estate,' found 'the disposition libelled on 'valid and effectual to the purchaser,' and found the letters orderly proceeded.† This judgment having been affirmed on appeal, the defender proceeded to sell the estate of Tillicoultry in different parcels, the last of which was sold in 1805. He applied part of the price to the payment of his debts, and the balance to the purchase of the estate of Balchristie. No proceedings were adopted by the substitute heirs of entail to compel a reinvestment of the price till 1822, when the defender having succeeded to a considerable sum of money by the death of a brother in India, the

* Stewart v. Fullerton, &c. Feb. 23. 1827, (ante, Vol. V. No. 237.)

† See Bruce v. Bruce, Jan. 15. 1799, (15539.)

present action was raised. Under these circumstances, the defender pleaded,

1. That the former action tried with the heirs of entail involved the question not only of the *power*, but of the *right* to sell, and that the judgment in that case, therefore, was res judicata here; and,

2. That the 'price' which was now demanded to be reinvested was spent, and no longer traceable; and the demand therefore resolved into a claim for damages, which must be considered as barred by nearly thirty years acquiescence since the sale of the lands.

To this it was answered,

1. That the question really tried in the former action was the validity of the sale to the purchaser, and that the Court had avoided finding that the defender had 'right' to *sell by* not decerning in terms of the libel, but merely finding the 'disposition 'valid and effectual to the purchaser;' and,

2. That the price demanded to be reinvested was not the ipsa corpora of the money paid for the estate, but the amount received in lieu of it; and that the claim was not at all of the nature of an ordinary claim of damages, but for performance of an obligation incumbent on the defender, in consequence of his violation of the prohibition in the entail, and could not be cut off by mere acquiescence.

The Court repelled the defences proponed, and found 'that 'the defender is accountable for the price obtained for Tillicoul-'try,' and remitted to the Lord Ordinary to proceed accordingly.

LORD JUSTICE-CLERK.—It does not appear to me that there is any thing in either of the specialties pleaded by the defender. 1. There is no res judicata, by the decision in 1799, on the point here involved. The summons in that case does not raise this question; and at all events the judgment of the Court proceeds expressly on the defect in the resolutive clause, and merely finds the disposition valid to the purchaser. 2. I cannot see that the present claim can be barred by delay or acquiescence, if not cut off by prescription; and that not being the case, the pursuer is entitled to have the obligation which lies on the defender to reinvest enforced.

LORDS GLENLEE and PITMILLY concurred.

LORD ALLOWAY entertained a different opinion from the other Judges on the general question tried in the case of Ascog, and therefore considered it unnecessary to enter on the specialties, as on that general point he was of opinion that the defender should be assoilzied.

J. IRVING, W. S.—J. FORMAN, W. S.—Agents.

J. MILLER and Others, Pursuers.—*Sol.-Gen. Hope—Rutherfurd.* No. 397.
G. BROWN and Others, Defenders.—*Jameson—Matheson.*

Lis alibi pendens.—An action having been raised and carried on in an Inferior Court, and thereafter an action of the same nature having been brought before the Court of Session and the former advocated ob contingentiam, a defence of lis alibi sustained.

MILLER and others, after bringing an action before the Magistrates of Glasgow, in which considerable procedure had taken place, raised another against the same parties and for the same debt before the Court of Session, and then brought an advocation ob contingentiam. In defence it was maintained that the action was excluded by lis alibi pendens. The Lord Ordinary and the Court sustained this defence.

June 22. 1827.
1ST DIVISION.
Lord Eldin.
H.

GIBSON-CRAIGS and WARDLAW, W. S.—J. MACDONELL, W. S.—J. GEMMEL,—Agents.

A. TORRY and Others, Petitioners and Respondents.—*Cockburn—Robertson.* No. 398.
J. SPENCE, Respondent and Petitioner.—*D. of F. Moncreiff—D. Macfarlane.*

Bankrupt—Sequestration.—A meeting of creditors ordered to receive the resignation of the trustee on a bankrupt estate. Observed, that a trustee is not entitled to reject claims duly received, on making up his report as to the concurrence in an offer of composition.

THE estates of Torry having been sequestrated under the Bankrupt Act, and Spence appointed trustee, Torry offered a composition, which was agreed to by the creditors who were present at the meeting. Thereafter Spence proceeded to investigate their claims, some of which he rejected, and then reported that the requisite concurrence had not been obtained. A meeting of the creditors was afterwards held, at which they resolved that it was inexpedient to have any further procedure under the sequestration, except to have the composition approved of, and the trustee discharged,—recommended to the trustee to give to the bankrupt the necessary certificate,—and authorized the bankrupt to apply to the Court for an approval of the composition. Against this resolution Spence presented a petition and complaint, praying to have it found null and void, and that two of the commissioners were disqualified from acting,—to appoint a general meeting for a new election of commissioners, and to receive his resignation.

June 22. 1827.
1ST DIVISION.
S.

At the same time Torry, with concurrence of a large body of the creditors, also presented a petition to the Court, praying for the appointment of a meeting to remove Spence, or receive his resignation, or otherwise to ordain him to grant the proper certificate, and thereafter to approve of the composition.

On the part of Torry and others it was maintained, That Spence had acted illegally in rejecting the claim of any of the creditors who had been ranked, seeing that he had no power to do so, except on the occasion of making a dividend, and that his conduct in other respects had been such that he ought to be removed. On the other hand Spence contended, That he was bound to investigate the state of affairs before he could be obliged to grant a certificate, and therefore he had acted legally; but, as he was willing to resign, he had no objection to a meeting being called for that purpose.

The Court granted the prayer of Spence's petition as to calling a meeting for receiving his resignation, and appointed Torry's petition to be intimated.

The LORD PRESIDENT observed, that Spence had no power to reject claims which had been received at this stage of the proceedings.

J. PEDDIE jun. W. S.—CAMPBELL and BURNSIDE, W. S.—Agents.

No. 399.

Captain MACPHERSON, Pursuer.—*Fullerton—Jameson.*
MACPHERSON'S TRUSTEES, Defenders.—*D. of F. Moncrieff—H. J. Robertson.*

Marriage-Contract.—A party having bound himself by his contract of marriage to provide and secure to the heir of the marriage the whole estates belonging to him at the time of his death; and having granted a trust-deed for payment of debts, and creating a sinking fund, and for other purposes—Held that the deed was ineffectual against the heir, except in relation to the payment of debts.

June 22. 1827.

1ST DIVISION. Lord Newton. D.

BY the contract of marriage between Colonel Duncan Macpherson of Cluny and Mrs. Catherine Cameron, executed in June 1798, he bound himself 'to provide and secure the whole 'heritable property belonging to him at his death to and in fa-'vours of himself and the heirs-male of the marriage between him 'and the said Catherine Cameron,' whom failing, a series of substitutes, but that 'under the reserved power and faculty always 'to the said Colonel Duncan Macpherson, at any time during 'his life, by a deed of entail, or other deed under his hand, to 'put the heirs hereby entitled to succeed to the said lands and

'estate under such limitations and restrictions, with respect to 'alienating the same, or contracting debts thereupon, as he shall 'think just and reasonable, and to vary, alter, and enlarge the 'substitution in any manner he may think proper, provided the 'same in no ways hurts or prejudges the heirs-male to be pro-'created of the present marriage.' By this deed he also provided an annuity of £200 to his wife, and £4000 to the younger children of the marriage.

In 1801 he made an entail of the estate, and having contracted considerable debts, he executed in 1804 a trust-disposition, whereby he conveyed his estates to trustees, inter alia, for payment of his debts,—of an increased annuity to his wife,—and an enlarged provision to his family, and then he declared, that 'after payment of 'the said jointures, annuities, interest of debts, and expense of 'management, the said trustees are hereby directed to apply an 'annual sinking fund, to the amount of £500 sterling money, if 'so much remain, towards payment and extinction of the principal 'or capital sums due by me; and after deduction thereof, and of 'the said jointures, annuities, interests of debts, and expense of 'management, to make payment of the free residue to the heir of 'entail who would be entitled to assume the possession of my 'said estate, if this trust-deed did not exist; nor shall it be com-'petent to the said heir to inquire into or interfere with the ma-'nagement, nor to quarrel or impugn the accounts of my said 'trustees, nor to object to any article for which they shall take 'credit, upon pretence of enlarging the said annual free residue; 'but he shall be obliged to accept of their accounts, or of any 'abstract showing the free residue, as the same shall be attested 'by the acting trustee or trustees for the time, or their quorum, 'without any inquiry or ground of objection whatever, other than 'what may arise from the adjustment and ascertainment of their 'accounts by an accountant of character, in manner hereafter 'directed.' And further, he 'provided and declared, that the 'present trust shall subsist until the whole debts chargeable upon 'the said estate, or owing by me, are paid and cleared off, so that 'my said estate becomes perfectly free and disencumbered, and 'that the heir entitled to succeed to it attains the age of twenty-'five years complete; and, upon the termination of the said trust, 'the said trustees shall be obliged to yield the possession of my 'said estate to the heir of entail, who, if there was no trust-dis-'position, would be entitled to assume the possession of my said 'estate, and to denude thereof in favour of the same series of 'heirs, and under the same conditions, provisions, and declara-'tions, clauses irritant and resolutive, that are contained in the

'said deed of entail.' In virtue of this deed, the trustees were duly infeft.

Colonel Macpherson died in August 1817, leaving a large family, of whom the pursuer was the eldest son, and debts and provisions to an extent which, together with the sinking fund of £500 per annum, deprived him entirely of any revenue from the estate. He afterwards brought an action of reduction of the trust-deed, upon the ground that it was ultra vires of his father, in respect of the obligations in the contract of marriage; and he therefore concluded 'that the same ought to be reduced, saving and 'excepting in so far as the said trust-deed of 30th August 1804 'may be held by our said Lords to be a security for payment of 'the bonâ fide and onerous debts owing by the deceased Colonel 'Duncan Macpherson, the granter, at the time of his death, and 'for payment of the subsisting family provisions, or for payment 'of other debts and obligations contracted by the said trustees, 'for the purpose of discharging the debts outstanding, or exi-'gible from the said Colonel Duncan Macpherson himself at the 'time of his death,—and also saving and excepting the heritable 'bonds, and the bonds and dispositions in security, or personal 'bonds, granted by the said trustees to third parties, in security 'of the repayment of the money borrowed by the trustees, and 'applied for the purposes foresaid,—and also saving and except-'ing the instruments of sasine following on the said heritable 'bonds, and bonds and dispositions in security, and all deeds of 'transmission or assignation of the said heritable debts and se-'curities.'

And he further concluded, 'That it should be declared that 'the pursuer is entitled to succeed to the foresaid lands and 'estate of Cluny and others contained in the foresaid marriage-'contract and trust-deed, free of all limitations, conditions, and 'restrictions, in so far as imposed by the trust-deed, excepting 'always as aforesaid; and that he is entitled to the just and true 'rents, produce, and profits thereof from and after the term of 'Martinmas 1817, being the first term after the death of the said 'Colonel Macpherson;' or otherwise, in case the trust-deed should not be reduced in toto, then that the trustees should be ordained to convey the estates to him 'under burden of the debts bonâ fide 'contracted by the trustees to third parties, and still outstanding.' In support of this action it was maintained, That the pursuer stood in a double capacity in relation to his father,—that he was not merely his heir, but was his creditor;—that although he was liable to be postponed to all the onerous creditors, yet it was not within the power of his father gratuitously to deprive him of any

part of the estate; and that although he might competently object to the increased provisions to the family, and to debts contracted by the trustees, yet he merely insisted that they ought to convey the estates to him without the burden of the sinking fund, or any other limitations not warranted by the marriage-contract.

In defence the trustees contended,

1. That the trust-deed was not ultra vires of Colonel Macpherson, in so far as it put them in possession of the estate for the benefit of his creditors, and that they were entitled to retain that possession until the debts and burdens were paid; and,

2. That neither was it ultra vires, in so far as it directed them to provide for payment of the debts, by annually appropriating the surplus of the rents towards extinction of these debts.

The Court, on the report of the Lord Ordinary, pronounced this interlocutor:—'Find, in respect of the marriage-contract of 'the late Colonel Duncan Macpherson, dated 12th June 1798, 'that the trust-deed in question thereafter executed by him was 'ultra vires of the granter, and cannot be sustained to any effect 'whatever, except as a security for payment of bonâ fide and 'onerous debts owing by the said Colonel Duncan Macpherson 'at the time of his death, and for payment of reasonable and 'suitable provisions to his widow and younger children, and also 'for payment of the real and personal debts that have been con-'tracted by the said trustees, and applied in discharging the 'bonâ fide and onerous debts which were outstanding or exigible 'from the said Colonel Duncan Macpherson at the time of his 'death: Find that the trustees had full power by the said trust-'deed to borrow money for the said purposes, and to grant herit-'able bonds, and bonds and dispositions in security, and personal 'bonds therefor: Find that the heritable bonds, and the bonds 'and dispositions in security, and personal bonds granted by the 'said trustees to third parties, in security of the repayment of 'the money borrowed by the trustees, are valid and effectual, with 'all that has followed or may follow thereon: Find that the cur-'rent leases granted by the trustees to third parties of the lands 'contained in said trust-deed, are not challenged by the pursuer, 'and that the trustees are to be relieved thereof: Find that 'neither the subsisting provisions in favour of the widow or 'younger children are challenged by the pursuer, and that the 'same are therefore to be held as reasonable and suitable, and to 'have effect accordingly: Find that the pursuer is entitled to 'succeed to the lands and heritages contained in the said mar-'riage-contract and trust-deed, free of all limitations, conditions, 'and restrictions, in so far as imposed by the said trust-deed, but

'always with and under the real burden of the existing debts 'contracted and secured as aforesaid by the trustees, and of the 'subsisting family provisions; and that the pursuer is entitled to 'the just and true rents, produce, and profits of the said lands 'and heritages contained in said trust-deed, from and after the 'term of Martinmas 1817, being the first term after the death of 'the said Colonel Duncan Macpherson, and in time coming, 'and to have the said bygone rents, produce, and profits ac- 'counted for to him accordingly: Ordain the said trustees forth- 'with to dispone, convey, and make over the said haill lands and 'heritages contained in the said marriage-contract and trust-deed 'to the pursuer, and to the other heirs and members of tailzie 'called by the deed of entail executed by the said Colonel 'Duncan Macpherson, and under the conditions, provisions, and 'declarations, clauses prohibitory, irritant, and resolutive, con- 'tained in the said deed of entail; but always with and under the 'real burden of the said debts contracted by the said trustees to 'third parties, and secured as aforesaid, so far as the same may 'be yet unpaid; and also under the burden of the subsisting 'family provisions, as well as of relief to the trustees of all bona 'fide and onerous debts and obligations come under and con- 'tracted to third parties by them as trustees, the said conveyance 'to be a burden upon the said deed of entail; reserving always to 'the pursuer all competent right of recourse against the separate 'estate of the said deceased Colonel Duncan Macpherson, if he 'left any, in order to obtain relief for such of the said debts as 'shall, by the conveyance to be executed by the trustees as afore- 'said in favour of the pursuer, be enumerated as encumbrances 'affecting the lands and heritages contracted as aforesaid, and 'also reserving to the pursuer all competent right to insist in an 'action for the purpose of having it found and declared that he 'is entitled to sell such parts of the said lands and heritages as 'may be necessary for the discharge of the debts and obligations 'brought against the contracted estate, and interest due and aris- 'ing thereon; and reserving to all concerned all defences compe- 'tent against such action, as accords; and decern and declare ac- 'cordingly.'

J. Arnott, W. S.—Mackenzie and Innes, W. S.—Agents.

J. Brown, Advocator.—*Jeffrey—Robertson.* No. 400.
T. and A. Oliver, Respondents.—*Cockburn—Graham Bell.*

Proof—Reparation.—Held that warrants are the only proper evidence of alleged oppressive judicial proceedings and imprisonment.

June 22. 1827.
2d Division.
Ld. Cringletie.
B.

Brown raised an action of damages before the Sheriff of Roxburghshire, on account of certain defamatory words alleged to have been used regarding him on several occasions by Olivers, the respondents, and of certain alleged illegal and oppressive proceedings on their part in obtaining warrants against him from Justices of the Peace, and thereon apprehending him. The Sheriff allowed a proof, in which evidence was led as to the defamation; but as to the alleged oppressive proceedings before the Justices of the Peace, the warrants said to have been obtained were not produced. The Sheriff having assoilzied Olivers, Brown brought an advocation, in which the Lord Ordinary pronounced an interlocutor as directed by the late Judicature Act, containing special findings as to the facts proved by the evidence in the Inferior Court, and with these findings his Lordship remitted simpliciter. On a reclaiming note, however, by Brown, the Court took a different view of the import of the evidence, except as to the alleged oppressive proceedings before the Justices of the Peace, as to which they concurred with the Lord Ordinary that the warrants were the only proper evidence; and therefore, while they found that there was no proof of oppression, they likewise found that the defamation was proved, and subjected Olivers in £10 of damages, with expenses, amounting, when modified, to £133.

J. W. Ness,—Low and Rutherford, W. S.—Agents.

Professor Couper and Others, Pursuers.—*Sol.-Gen. Hope—Robertson.* No. 401.
Marquis of Bute, Defender.—*Jeffrey—Fullerton.*

Proving the Tenor—Proof.—Circumstances in which, by consent of parties, the proving of the tenor of a bond was dispensed with, and in which the Court found its import sufficiently instructed by written documents recovered under a diligence, and parole proof taken on commission.

June 22. 1827.
2d Division.
Ld. Cringletie.
F.

In 1817 an action was raised in name of the late Rev. James Couper, (then cognosced as insane, and since dead,) and of his father, Professor Couper, as his tutor, against the Marquis of Bute, concluding to have his Lordship ordained to deliver up a bond of annuity for £100 said to have been granted by the

late Marquis (grandfather of the defender) to Mr. James Couper, and by him delivered up to the late Marquis while incapable, from insanity, of acting for himself; and further concluding that his Lordship should be ordained to make payment of the annuity during the lifetime of Mr. James Couper. Against this action it was pleaded in defence, That the bond, which appeared to be no longer in existence, must necessarily have been conditional, and dependent on Mr. Couper not being otherwise provided for by the late Marquis; and that having received two small livings in Wales from his Lordship, the restoring the bond was an act of rational administration which could not be challenged.

The case having come before Lord Reston as Ordinary, his Lordship, after ordering condescendences, appointed them to be revised, 'with a view to a remit to the Jury Court.' Against the interlocutor making this appointment the Marquis of Bute gave in a representation, which, on the death of Lord Reston, came before Lord Cringletie, who sisted the cause till the pursuers should bring a process of proving the tenor of the bond. His Lordship's interlocutor having been brought under review by the pursuers, the Inner House recalled it, and remitted to him the reclaiming petition, with instructions to hear parties further, and grant diligences to both parties for recovering the bond, and all correspondence relative thereto. Under this diligence several letters relating to the arrangements between Mr. Couper and the late Marquis were recovered, but no trace appeared of the bond itself, which was supposed to have been destroyed by the Marquis when returned by Mr. Couper. The Lord Ordinary, on considering the written documents produced, refused the petition, and adhered to his former interlocutor, sisting process till a proving of the tenor should be brought. The pursuers thereupon again reclaimed to the Court; and Mr. James Couper having shortly thereafter died, Professor Couper and others sisted themselves parties as his executors. On advising the reclaiming petition, the Court, 'in respect that the parties, by their counsel, are agreed 'to dispense with a separate and formal action of proving the 'tenor of the bond in question, and that the pursuers shall be 'allowed to bring into Court a supplementary summons without 'abiding the ordinary induciæ, while it shall be competent to the 'defender to maintain the whole defences and pleas against the 'conclusions of both actions which would be competent to him in 'an action of proving the tenor,' recalled the Lord Ordinary's interlocutor, and remitted to his Lordship to proceed as he should see cause.

In consequence of the permission contained in this interlocutor,

the pursuers raised a supplementary summons to supply the defect in the first, arising from the bond being no longer in existence, and concluding to have it declared that the late Marquis of Bute bound himself to pay to Mr. Couper an annuity of £100 a year during his life, and that the obligation was valid and subsisting till his death; and to have the defender, as representing the late Marquis, ordained to pay the same during the several years in which it had remained unpaid down to the period of Mr. Couper's death. This summons having been conjoined with the depending action, the Lord Ordinary allowed a proof, before answer, of the contents of the bond, and thereafter reported the cause on minutes to the Court. On advising these minutes, the Court pronounced an interlocutor, finding 'that the question as 'to the terms and conditions of the bond should, before further 'procedure, be determined by the Court;' and ordered a State of the evidence on this point to be prepared at the sight of parties. From this State, and the admissions of the parties, the following circumstances appeared.—

Mr. James Couper, son of Dr. Couper, one of the Professors in the University of Glasgow, was, prior to his mental derangement, a young man of excellent abilities, and very amiable dispositions. While pursuing his studies at the university, in the year 1809, with a view to the Scotch church, he was engaged by the late Marquis of Bute to superintend, for a few months, the education of his Lordship's grandson. The Marquis having been greatly pleased with Mr. Couper, and being desirous to obtain his services as tutor to his youngest son, wrote to him shortly afterwards in these terms:—'Situated as I happen 'to be, without entering into further reasoning, I must observe 'to you the impossibility of holding out other prospects of assist-'ance than what is personal to myself. Should a vacancy take 'place, for example, in the kirk of Rothsay, and you competent 'to the presentation, I pledge my word to bestow it in your 'favour. In the mean time, did it suit your views and conve-'nience to live in my house, I shall gladly receive you, offering 'in such case a salary of £100, and to add £10 more to defray 'the cost of washing;—such arrangement to date from the mo-'ment of your joining me,—say beginning of November next, 'after your examination. Your journey to be paid for by me, 'likewise those you may be called upon to make for the same 'purpose. This salary of £100 I propose continuing until you 'get the living of Rothsay, or that you are able to obtain a better 'provision.' Mr. Couper at this time possessed the permanent situation of keeper of the Hunterian Museum of Glasgow, to

which is attached a salary of £65 a year; and being hopeless of attaining such a proficiency in the Gaelic language (in which one of the services of each day is performed at Rothsay) as would enable him properly to fulfil the duties of the charge as pastor of the parish, he wrote to Lord Bute, stating this incapacity to accept the living of Rothsay as likely to effect some alteration in his Lordship's plans, and expressing himself so as to impress Lord Bute with the belief that he entertained an unwillingness to enter his family.

To this letter the Marquis wrote in answer:—'Truly sorry 'do I feel in learning your determination in renouncing the kirk 'of Rothsay. The prospect of presenting you to a church likely 'to become a more profitable situation than the generality in 'Scotland, was a justification to my mind for asking you to give 'up the certainty you now enjoy as keeper of the museum, espe-'cially as I could make it good myself in the interim. That 'prospect no longer in view, it would to the last degree prove 'improper in me to consent to or allow such a sacrifice of your in-'terests; particularly, indeed, since my absolute renunciation of 'all political connexion puts it completely out of my power to 'render you, or any one, service.' And his Lordship, in a subsequent letter, expressed himself to a similar effect:—'As long as I 'had it in my power to hold out to you a certainty of provision, 'which the kirk of Rothsay no doubt afforded, I felt no difficulty 'in agreeing to your giving up the situation of keeper of the 'museum, because I could in the interim make it good. At present, 'however, that you declare the impossibility of qualifying your-'self for the said church, the case becomes widely different. As I 'expressed in my last, how could I conscientiously permit you 'to join me, when you have no prospects of preferment,—at best 'a mere chance, and that you must per force, in adopting such a 'plan, relinquish the little you now enjoy?' His Lordship, however, added:—'In other respects, my sentiments towards you re-'main the same, and I with pleasure confirm the proposal con-'tained in my letter to you from Mountstuart of the 23d June 'last, though I do not think your father ought to let you accept 'it.' Mr. Couper accordingly finally declined the proposal of going into the Marquis's family by a letter dated 21st September 1809. The Marquis about this time returned to England, from whence he shortly afterwards wrote to Mr. Couper, expressing his regret that it did not suit Mr. Couper's views to go into his family, but at the same time inviting him to pay his Lordship and Lady Bute a visit for a few months. This invitation was accepted by Mr. Couper, who set out from Scotland in the month

of November; but, immediately before he left Glasgow, his father received from Lord Bute the following letter:—'Having reflected upon the best means of securing to your son James a settled permanency, should he incline to attach himself to my house, I beg to state my readiness to execute a bond of annuity in his favour of £100, payable out of my landed property. Should this arrangement meet your approbation, it might perhaps preclude the necessity of so immediately attending to the preparation for the church, which could be carried on in any leisure moment.' It appeared that at this time Lord Bute had formed a resolution to go abroad, in consequence of the ill health of Lady Bute; and on Mr. Couper's arrival in London, it was proposed that he should accompany them. This he was prevailed on to consent to, and a bond of annuity of £100 was immediately executed by the Marquis in his favour. This bond was seen in London by Dr. Thomson, who had been applied to by Mr. Coutts, Lord Bute's banker, to prevail on Mr. Couper to accompany his Lordship abroad, and he deponed that he had read the bond, and that it was 'absolute and unconditional for £100 a year to Mr. Couper, payable out of the Marquis's Scotch estates;' and further, that he 'did not recollect if the bond expressed that the annuity 'was for life; but if he did say it was, this would be according 'to his conscience.' The bond was afterwards transmitted to Professor Couper at Glasgow, and while in his hands it was seen by Professor Meikleham of that university, who in like manner deponed that by it 'the late Marquis of Bute promised, 'or bound himself to pay the late Mr. James Couper £100 sterling yearly for life.'—'That there was no condition whatever 'in the paper, and the deponent was particularly struck at that;' and 'that the paper bore that the annuity was to be paid out 'of the first and readiest of the Marquis's estates in Scotland.' This bond having been granted, Mr. Couper went abroad with the Marquis, and continued in his family for some years. On their return to England, he took orders in the English church, and was presented by his Lordship with two small livings in Wales. On leaving Lord Bute's family in autumn 1812, he entered himself as a gentleman commoner at Cambridge. He still continued to draw the annuity after his appointment to the Welsh livings; but in the beginning of 1813 he left the university, and wrote to his father to send him the Marquis's bond. This request his father complied with, and Mr. Couper, it appears, immediately transmitted it to Lord Bute in a letter which could not be found among his Lordship's papers; but, of date 6th February 1813, his Lordship had addressed a note to Messrs. Coutts

and Company (who had previously been directed to pay the annuity on Mr. Couper's order) in these terms:—'I have to request you that the annuity hitherto paid to the Rev. James 'Couper of £100 may be discontinued, that matter being otherwise settled.' On the 22d of February Mr. Couper came to Lord Bute's, and conducted himself so as to leave no doubt of his derangement; and his Lordship accordingly communicated the matter to his relations. Mr. Couper afterwards recovered so much towards the end of the year as to be allowed to return to his livings; but in 1815 it became necessary to convey him to Scotland, where he was cognosced the following year by a verdict which found that he was insane, and had been so from the 25th of December 1812. Prior to his son being cognosced, Professor Couper (though he had been made aware by his son that the bond had been returned to Lord Bute) had made no application to his Lordship, on the ground of his son having been in a state of insanity when he returned it; but, on Mr. Couper being cognosced, he applied to the present defender (the Marquis being now dead) for payment of the arrears of the bond, and this having been refused, he raised this action, in which the procedure above narrated took place.

The Court, after a hearing in presence on the import of the evidence regarding the contents of the bond, found that it was an unconditional bond of annuity for £100 a year in favour of the late Mr. Couper during his life; and, quoad ultra, remitted the case to the Jury Court.

J. G. Hopkirk, W. S.—T. Ferguson, W. S.—Agents.

No. 402.

Sir B. Dunbar and G. Dunnet.—*Maitland—Ivory.*
D. Clyne, S. S. C.—*Cockburn—Boswell.*

Multiplepoinding—Expenses—Arrestment.—A party in whose hands arrestments had been executed, having thereafter accepted bills for the fund so arrested in favour of the common debtor, who indorsed them to a third party aware of the arrestment; and the arrestee having raised a multiplepoinding, and the arrester having been preferred—Held,—1.—That the arrestee was not entitled to the expenses of raising the multiplepoinding;—and,—2.—That both he and the indorsee of the bills were liable to the arrester in expenses.

June 23. 1827.

1st Division. Lord Eldin. S.

Clyne, who was creditor of one Fraser, executed an arrestment, on the 10th of May 1825, to the extent of £500, in the hands of Sir Benjamin Dunbar, and thereafter he constituted his debt against Fraser to the amount of £460. On the 17th of June

Sir Benjamin Dunbar accepted two bills in favour of Fraser, the one for £150, and the other for £20, payable four months after date. In December of that year Clyne raised a process of forthcoming against Sir Benjamin, to which he called Dunnet, an alleged creditor of Fraser, as a party. Thereafter, on the 17th of that month, Fraser indorsed the two bills to Dunnet, and thereupon a process of multiplepoinding was brought by Sir Benjamin, who also raised a suspension of a threatened charge on the bills. The Lord Ordinary preferred Clyne to the fund in medio, under deduction of the expenses incurred by Sir Benjamin, but found no expenses due to Clyne. The latter thereupon reclaimed, and contended, That as Sir Benjamin had granted the bills subsequent to and in breach of the arrestment; and as Dunnet must have been aware of its existence prior to the bills being indorsed to him; they ought to be found liable to him in expenses.

The Court accordingly, on these grounds, altered the interlocutor, found Sir Benjamin entitled to no expenses as raiser, and decerned against both him and Dunnet for those incurred by Clyne.

J. HENDERSON, W.S.—A. W. GOLDIE, W. S.—D. CLYNE, S.S.C.—Agents.

J. DALLAS, Pursuer.—*A. M'Neill.*
R. FRASER, Defender.—*Lumsden.*

No. 403.

Process—Reduction.—Certification contra non producta having once passed, the Lord Ordinary can pronounce no order inconsistent with it till the certification be recalled.

June 23. 1827.

2D DIVISION.
Lord Newton.
F.

IN a process of reduction of a decree of a Sheriff Court, in which the decree itself, but not the grounds and warrants, had been produced, the Lord Ordinary granted certification contra non producta. Thereafter, on a motion at the bar by the defender, his Lordship granted warrant to transmit the grounds and warrants of the decree; but the pursuer having reclaimed, the Court recalled his Lordship's interlocutor, reserving to the defender to apply to be reponed against the certification.

LORD GLENLEE.—I think the certification should not have been granted, and perhaps the Lord Ordinary might have recalled it as incompetently pronounced; but while it subsists, he cannot pronounce any contrary order.

The other Judges concurred.

J. TURNER, W. S.—S. F. MACKINTOSH, W. S.—Agents.

No. 404.

Dr. Claud Currie, Pursuer.—*Jeffrey—More.*
P. Jardine and Miss M. Currie, Defenders.—*D. of F. Moncreiff—Forsyth—Cockburn.*

Cognition.—Held, that although it was found, by a verdict of insanity, that the party had had a lucid interval on a certain day within the period during which the insanity subsisted, yet as a reduction had been brought of that part of the verdict, it was no bar to an action of reduction, on the ground of insanity, of a deed executed on that day.

June 23. 1827.

2d Division. Lord Newton. B.

The pursuer, Dr. Currie, having taken out a brieve for cognosting his mother, the late Mrs. Margaret Baldwin or Jardine, the cognition was proceeded with before the Sheriff of Lanarkshire, and Dr. Currie on the one hand, and Mrs. Jardine's husband on the other, appeared by counsel before the inquest. Evidence having been led on both sides, the Jury returned a verdict cognoscing Mrs. Jardine, and finding that she had been insane since the end of March 1817; but also finding, by a plurality of voices, 'that 'the insanity had been interrupted by occasional lucid intervals, 'and particularly that there was such a lucid interval on the 2d 'day of June 1818 years.' On the day thus excepted in the verdict Mrs. Jardine had executed a deed of settlement in favour of the defenders, her husband Mr. Jardine, and her daughter Miss Currie, to the prejudice of Dr. Currie, the pursuer, her eldest son and heir.

For the purpose of setting aside this deed, Dr. Currie raised the present action of reduction, on the ground that Mrs. Jardine was insane at the period of its execution; and he also brought a reduction of the verdict of the Jury, so far as it found a lucid interval, on the grounds that such a finding by an inquest of cognition was incompetent, and that it was contrary to the evidence adduced.

Against these actions it was pleaded in defence, That the finding of a Jury was a competent answer to the query in the brieve, Quamdiu sustinuit istam fatuitatem, and was completely supported by the evidence; and at all events, that until it was actually reduced, it was a bar to the reduction of the deed of 2d June 1818, on an allegation of insanity contrary to the finding of the Jury.

To this it was answered, That, supposing the verdict to stand, it still was no bar to the reduction of the deed, because the finding of sanity by a Jury of cognition was in no way exclusive of the proof of insanity, and because, even if Mrs. Jardine had a lucid interval on the 2d of June, that interval might have elapsed, or might not have commenced at the time of the day when the deed was executed; but besides, that a reduction of the verdict

having also been raised, it was proper that both causes should go together to a Jury.

The Lord Ordinary found that 'the verdict of the Jury forms 'no bar to remitting the case to the Jury Court,' and therefore conjoined the two processes, with a view to a remit; and the defenders having reclaimed against his Lordship's interlocutor, the Court, after ordering Cases, unanimously refused the reclaiming note, and remitted the cause to the Jury Court.

W. and A. G. Ellis, W. S.—D. Brown, W. S.—Agents.

J. Pollock, Pursuer.—*Sol.-Gen. Hope—Jameson—Shaw.* No. 405.
J. Kirkwood, Defender.—*D. of F. Moncreiff—Greenshields—Hunter.*

This was a complicated question of accounting, in which the Lords Ordinary assoilzied the defender; but the Court altered, and decerned against him.

June 26. 1827.
1st Division.
Lords Alloway and Eldin.
S.

W. Patrick, W. S.—Tod and Wright, W. S.—Agents.

Marquis of Stafford and Others, Pursuers.—*Cockburn.* No. 406.
M. Mackenzie, Defender.—*Sol.-Gen. Hope—Robertson.*

Process—Title to Pursue—Road.—Held,—1.—That after a cause has been prepared, (but the record not closed,) and remitted to the Jury Court, and retransmitted by that Court to the Court of Session to hear parties on points of law, it is not competent to order the case to be of new prepared;—and,—2.—That an ex facie regular decree of the Quarter Sessions, ordering a road to be shut up, must be set aside before the party against whom that decree has been pronounced is entitled to insist in a declarator of right to the road.

The Marquis of Stafford, and a great number of other persons resident in various parts of the north of Scotland and in England, having brought an action of declarator against Mackenzie of Ardross to have it found that they were entitled to the use of a road through his property for driving cattle, the Lord Ordinary, after ordering a condescendence and answers, which were lodged, remitted the case to the Jury Court. By that Court the parties were ordered to revise their condescendence and answers, and to lodge notes of pleas, which was accordingly done. Various defences were there urged by the defender; and among others, he maintained that, as the road had been ordered to be shut up by a final judgment of the Quarter Sessions, the pursuers were not entitled to insist in a declarator of right to it. The Jury Court then ordered that the process 'be 'retransmitted to the Court of Session to decide the questions

June 26. 1827.
1st Division.
Lord Eldin.
D.

'of law and relevancy stated in the pleas of law lodged by the 'defender.' The record had not been closed; and when the case returned to the Lord Ordinary, he appointed the parties to revise their papers. Against this order Mackenzie reclaimed, and contended that as the case had been retransmitted from the Jury Court for the special purpose of hearing parties on the points of law, it was incompetent to ordain them to prepare the case of new.

The Court, being of this opinion, recalled the order, and appointed parties to be heard on the merits. At the hearing two points were rested on by the defender,—

1. That as almost all the pursuers resided at a great distance from the road, some of them in remote parts of Scotland, and others in England, they had no title or interest to pursue the action; and,

2. That the final decree of the Quarter Sessions deprived them of a title to insist until it was set aside.

To this it was answered,

1. That the pursuers being either heritors, residenters, or extensive cattle-dealers in the neighbourhood of the road, or who had been accustomed to make use of it, had both a title and interest to insist on the road being kept open; and,

2. That the decree of the Quarter Sessions had been obtained in the most irregular and illegal manner.

The Court, without deciding the first point, held that whether the judgment of the Quarter Sessions was well founded or not, or had been regularly or irregularly obtained, still, as it was ex facie a good judgment, it must be set aside before any further procedure could take place in this case, and therefore sisted process till a reduction of that judgment should be brought.

HORNE and ROSE, W. S.—H. MACQUEEN, W. S.—Agents.

No. 407.

Dr. DUNCAN, Pursuer.—*A. Wood.*
HUGO ARNOTT, Defender.—*Forsyth.*

Proving of the Tenor.—Held that it is incompetent to prove the tenor of an unextracted decree or interlocutor, without also proving the tenor of the summons.

June 26. 1827. 1st DIVISION.

DR. DUNCAN raised a summons of proving of the tenor of certain interlocutors which had been pronounced in a process, the originals of which, together with the summons, had been lost. They had not been extracted; and it being objected that the pursuer ought to prove the tenor of the summons before he could competently prove that of the interlocutors, the Court sustained

the objection, and sisted process till a supplementary summons should be brought.

P. DUDGEON, W. S. Agent.

D. SIM, Pursuer.—*Jeffrey—Jameson.*
G. STEWART, Defender.—*Sol.-Gen. Hope—Forsyth.*

No. 408.

Sale—Bounding Title.—A party having purchased an area, which was described in the disposition as bounded by the property of another, (previously acquired from the same author,) and bearing reference to a plan, whereon this property was delineated as consisting of a house with a projecting outside stair—Held that although the stair projected beyond the property, yet he was not entitled to challenge it as an encroachment.

June 26. 1827.
2D DIVISION.
Ld. Cringletie.
B.

M'LEOD, the proprietor of certain subjects in the village of Gorbals, disponed in 1791 to Mitchells a part of it, described as a piece of waste or vacant ground, bounded in a manner specified in the disposition, which further reserved 'to my said 'disponees six feet backwards, to be kept clear for preserving 'my said disponees their light in any building to be erected 'on the premises.' Mitchells were infeft on this disposition in 1793, and they then built a house on the area so conveyed to them, erecting the back wall of the house on the verge of it, according to the boundaries specified in the disposition; but the house being intended to be occupied in two separate flats, they made a door in the upper flat opening to the back, for access to which they built an outside stair projecting over part of the six feet reserved in the disposition, and entering from a street which passed the side of the house. The house thus built was in 1812 (after an intermediate transference) conveyed to the father of the present defender, who was regularly infeft. In the mean time, the remainder of the property (on which also there was a house) descended, on the death of M'Leod, to his son, who in 1823 conveyed it to the pursuer Sim by a disposition describing it as bounded by 'property belonging to the heirs of the 'late Mr. John Stewart,' and making reference to a plan of the premises which was subscribed by the seller as relative thereto, and in which the defender's property was laid down with the outside stair delineated as part of it. No objection had previously been made to the stair by M'Leod or his son, but Sim now raised an action, concluding to have it found that he was proprietor of the six feet extending backwards from the defender's boundary, subject only to the service ne luminibus officiatur, and that the defender should be ordained to remove the outside stair as an encroachment on his property.

To this it was pleaded in defence,

1. That the pursuer's authors having allowed the stair to be built, and having acquiesced in its remaining for 30 years, the pursuer was barred, by their acquiescence, from challenging it; and,

2. That as the defender's property was declared in the pursuer's disposition to be the boundary of his purchase, and as the stair was in existence at the date of the disposition, and formed part of the defender's house, and was delineated as part of the house on the plan with reference to which he made the purchase, he could not bonâ fide have believed that he was purchasing the property over which it was built, or the privilege of having it removed.

The Lord Ordinary pronounced this interlocutor:—'In respect that when the pursuer purchased the property to which 'he refers in this process, he did so in conformity to a plan specially referred to in the disposition of it to him, which plan also 'bears reference to the said disposition: As also, in respect that 'on said plan the subject belonging to the defender is laid down, 'and the outside stair on the back part of it is also delineated, 'and the whole is thus described in the said plan, '*Property* be"longing to the heirs of the late Mr. John Stewart,' viz. to the 'defender in this action; and, lastly, that the disposition by 'Alexander M'Leod, heir of the author of the defender, and 'author of the pursuer, bounds the pursuer's subjects by 'pro"perty belonging to the heirs of the late Mr. John Stewart,' 'which is the property referred to in the said plan, finds that 'the stair must be held to be a part of that property, and of course 'was not conveyed to the pursuer by Alexander M'Leod; there'fore assoilzies the defender from this action, finds him entitled 'to expenses, and decerns.' His Lordship stated in a note that he did not think the plea of acquiescence could apply to a case regarding the assumption of feudal property requiring infeftment, unless amounting to prescription.

Against the Lord Ordinary's interlocutor Sim reclaimed, but the Court unanimously adhered.

LORD GLENLEE.—I thought at first that the Lord Ordinary, seeing the real justice of the case, had still had some difficulty in accommodating the law to it; but I am now satisfied he has done it very well. The stair was part of the house, and the pursuer takes the house as the boundary of his right, and I therefore think we must adhere.

LORD JUSTICE-CLERK.—I entirely concur. Any difficulty is completely removed by the circumstance of the plan being referred to in

the titles, and signed as relative thereto. It thus becomes part of the titles, as was settled in the case of Butterworth.

LORDS PITMILLY and ALLOWAY agreed.

Pursuer's Authority.—2. Ersk. 6. 3.

Defender's Authorities.—Lang, June 29. 1813, (F. C.); E. of Kinnoull, Jan. 18. 1814, (F. C.); Ayton, May 19. 1801, (Ap. Prop. No. 6.)

CAMPBELL and MACDOWALL,—D. FISHER, S. S. C.—Agents.

J. GIBSON-CRAIG, Pursuer.—*Cockburn.*
Sir P. WALKER, Defender.—*Sol.-Gen. Hope—Whigham.*

No. 409.

Repetition.—Held that a party who had enjoyed the office of Deputy Usher of Exchequer on a commission afterwards set aside, and had been found liable to account for the profits and emoluments of the office, was bound to repeat the fees levied by him, and a salary drawn under a sign manual during pleasure in his name personally, which, however, had always been granted to the holder of the office; but entitled, on the other hand, to deduct any sums paid to a substitute for performance of the duties, and a reasonable allowance when performed personally by himself.

June 26. 1827.

2D DIVISION.
Ld. Mackenzie.
M'K.

AFTER the interlocutor formerly pronounced in this action, ante, Vol. II. No. 332, (which see) finding the defender Sir Patrick Walker and his brother liable to account to the pursuer, as Principal Usher of Exchequer, 'for the profits and emoluments of the 'office of Deputy Usher,' held by them under a commission set aside in 1809 as vitiated in essentialibus, the cause returned to the Lord Ordinary, who appointed a condescendence of the profits and emoluments to be given in. These profits and emoluments consisted, 1. Of certain fees amounting on an average to about £55 per annum; and, 2. Of a 'salary' of £50 a year, which had always been in use to be granted out of the Civil List for Scotland, and had been drawn by Sir Patrick and his brother, in virtue of a sign manual during pleasure in their favour nominatim as Deputy Ushers; but Sir Patrick (whose brother was now dead) contended,

1. That the emoluments were but a reasonable compensation for the duties of the office, which had been actually performed by him and his brother.

2. That at any rate, as to the salary of £50, it did not belong to the office, but was drawn in virtue of a royal warrant during pleasure to Sir Patrick and his brother personally; and besides, that the pursuer had not appointed any deputy who could have been entitled to obtain a warrant for this salary till the year 1809; and,

3. That George Walker being now dead, his representatives must be made parties to the action.

To this it was answered,

1. That the performance of the duties of the office could be procured for a very trifling consideration, and that these duties had not been performed by Sir Patrick or his brother in person, and were of a nature that they could not be performed by persons in their station of life, and had accordingly been executed by a person appointed for that purpose, who received a trifling remuneration, the rest of the fees forming part of the profits of the office.

2. That the salary of £50 had always been granted to the persons holding the office in respect of the office, and so formed truly part of its emoluments; and,

3. That the defender and his sisters, being nearest of kin of George Walker, had been called in a summons of transference, in which, on no appearance being made, decree of transference in statu quo had passed; and besides, that as Sir Patrick and his brother held the office jointly, and were jointly decerned against, it was competent to proceed against either of them.

The Lord Ordinary found Sir Patrick liable for the several sums of fees and salary received by him, with interest from the date of receipt, but entitled, on the other hand, 'to deduct the 'sums actually paid to the person or persons who performed the 'duty of the office libelled, with legal interest on the same since 'paid;' and to his Lordship's interlocutor the Court adhered, with this variation, that Sir Patrick was also entitled to a reasonable allowance for such duties as he should instruct to have been performed in person by himself or his brother, as well as to deduction of sums paid to others for doing the duty.

Lord Justice-Clerk.—As to the salary, if it could be made out that it was an individual pension, there would be a great deal of difficulty in finding Sir Patrick accountable for it; but the term pension is not used in the sign manual, nor is it payable out of the Pension List. It is a salary attached to the office, and I cannot distinguish it from the other emoluments. As to the other point, I doubt if the reservation in the interlocutor is sufficiently broad; and if the whole duties were performed by a substitute, and that person had a certain allowance, then deduction can only be claimed of that allowance. But if Sir Patrick and his brother performed the duties personally, he is entitled to say I must have an allowance for doing that which carried on the office, and enabled the fees to be drawn; for, if the duties had not been done, the emoluments would undoubtedly have been stopped.

Lord Glenlee.—I entirely agree. This salary is undoubtedly part of the emoluments; but I can see no grounds for not granting the

remuneration if Sir Patrick had performed the duty himself, and which is given in the case of his having employed another person.

LORD PITMILLY concurred.

LORD ALLOWAY.—I concur on the general question; but as to the proposed deduction for duties performed by a person holding an office malâ fide, the duties of which the party having the true right was willing to perform, I know of no case to sanction it. On the contrary, in the case of Dr. Dick, although he had performed the duties of the parish to which he was inducted, and had drawn the stipend, no remuneration was allowed on his presentation being set aside, although he was not in malâ fide, as this defender has been found to be. At the same time, I admit that every sum which he has actually paid, and which Mr. Gibson-Craig's deputy would have been obliged to pay, forms a proper deduction.

LORD JUSTICE-CLERK.—My conception of this office is different from that of Lord Alloway. If the duties had not been performed, the fruits would not have arisen. This was the principle of decision in the case of M'Donald *v.* Jack, and the case of Dick does not apply, because the fruits there did not arise from performance of the duties, while here they do.

GIBSON-CRAIGS and WARDLAW, W. S.—A. GOLDIE, W. S.—Agents.

A. LYLE.—*Spicrs.*

J. GREIG and Others.—*Cuninghame—D. Macfarlane.*

No. 410.

Poinding—Legal Diligence—Erasure.—Held, that a caption raised before the expiration of the inducise is inept;—questions argued, but not decided, first, whether a delay of four months in reporting a poinding renders it null and void, or only inchoate; and, second, whether an erasure in the date of an execution of poinding is fatal to it, although made apparently to rectify a mistake.

June 27. 1827.

1ST DIVISION. Lords Alloway and Eldin. S.

ON the 2d of November 1820 Lyle raised letters of horning against Robert M'Vey, farmer at Ballantoun, for payment of £122: 16: 11¼, and charged him on the 7th. The letters were denounced on the 21st, caption was issued on the 22d, and on the 25th an execution of search was returned against him. On the 27th Lyle executed a poinding of M'Vey's effects situated on his farm, but which were subject to the landlord's right of hypothec. No further proceedings were taken till the 29th of March 1821, in consequence, as Lyle alleged, of it being necessary to arrange with the landlord, and of M'Vey having proposed to pay a composition to his creditors. On that day, however, he reported

the execution of poinding to the Sheriff, and he obtained a warrant of sale on the 31st, in virtue of which the effects were sold on the 25th of April, and the proceeds received by Alexander Mill, who had been appointed commissioner for that purpose. Greig and others, who were also creditors of M'Vey, then executed arrestments in the hands both of Lyle and of Mill, and lodged claims in the process of poinding, maintaining that they were entitled to a pari passu preference with Lyle. A multiplepoinding was thereafter raised in this Court, and an advocation ob contingentiam was brought of the process of poinding, which were conjoined.

On the part of Greig and others it was then contended,

1. That as the date of the execution of poinding had been originally written 27th November 'eighteen hundred and twenty-'*one*,' and the word 'one' had been erased, and the word 'years' substituted in its place; and as the erasure was manifest, and was in a material part, the execution was void and null.

2. That supposing it were not so, the poinding was inept and ineffectual; because, although it was executed on the 27th of November 1820, and although the Bankrupt Statute requires that it shall be 'forthwith' reported to the Sheriff, yet no report had been made till the 29th of March 1821, being more than four months; and,

3. That although warrant of sale had been granted on the 31st of March 1821, yet it had not been executed till the 25th of April, being more than 20 days from its date, and so contrary to the statute.

To this it was answered by Lyle,

1. That there was no evidence that the date had been originally written 1821; that it was admitted and proved that the poinding had been in point of fact executed in 1820; and that the circumstance of the word 'years' being written upon an erasure was of no importance, because the execution was sufficient, even if that word were to be held pro non scripto.

2. That the statute does not require that the execution shall be reported within any specific period, and therefore it is relevant to show circumstances to account for and excuse the delay:—that in this case the proceedings in the poinding were obstructed by the existence of the landlord's hypothec and the proposal of composition, and that, so soon as these obstacles were removed, the report had forthwith been made to the Sheriff:—that, besides, the statute did not declare that the poinding should be null and void; but that the only effect of the delay was to enable a creditor who had competing diligence to obtain a preference by complet-

ing it in terms of law; and that in this case the other parties had no competing diligence; and,

3. That the statute did not apply to the sale of the effects, but to the publication, which had been made within the twenty days, and therefore the objection to the irregularity of the sale was unfounded.

On hearing parties in regard to the second objection, (the others not having been at this time stated,) Lord Alloway pronounced this interlocutor:—'In respect that the common debtor M'Vey 'was rendered bankrupt by an execution of search on a caption 'upon the 25th November 1820, and the execution of poinding 'in question is dated upon the 27th of that month, which was not 'reported to the Sheriff till four months thereafter; and this de-'lay, it is alleged, was occasioned, first, by a preferable claim hav-'ing been made by the landlord, the Duke of Montrose, for the 'whole of the common debtor's effects; and, secondly, by an offer 'of composition and settlement by the common debtor; finds 'that this poinding, until it was so reported, could only be held 'as an inchoate diligence, and that the advocator Mr. Greig, or 'any other creditor, completing their diligence in the mean time, 'must have been preferred upon the principle laid down by the 'Court in the case of Sampson and others against M'Cubbin, '15th May 1822; but as there is no competition with any dili-'gence that had been completed before the poinding in question 'had been reported and rendered effectual by the sale under 'the Sheriff's warrant, there is no reason for setting aside that 'poinding as ineffectual on account of the execution not having 'been immediately reported, since Lyle had no interest to report 'the poinding until he ascertained that there were effects of the 'tenant's not carried by the landlord's preferable right, and the 'diligence is not, by the delay, rendered null and void; there-'fore sustains the poinding, and appoints the cause to be en-'rolled, that the interests of the parties may be adjusted accord-'ingly.' Greig and others having represented, Lord Eldin reported the cause to the Court on Cases; and an objection having been stated, at the advising, to the regularity of the diligence, on the ground that the denunciation had been made and the caption issued before the expiration of the induciæ, so that M'Vey had not been rendered bankrupt four months prior to their appearance, their Lordships appointed them 'to lodge a minute as 'well upon the point of vitiation, as upon the alleged irregularity 'of the caption.' Thereafter their Lordships found 'that the cap-'tion was raised before the days of the charge were expired, and 'therefore that the said Robert M'Vey was not regularly made

'bankrupt upon the 25th of November 1820 years, and remit to 'the Lord Ordinary to proceed accordingly; but find no expenses 'due to either party, except the expenses of bringing the multi-'plepoinding into Court.'

On the general point relative to the reporting of the poinding, their Lordships concurred in the doctrine laid down by Lord Alloway; but there was a considerable difference of opinion as to the effect of the erasure, seeing that it was demonstrable that the poinding could not have been in 1821. As their Lordships, however, were unanimous that the objection to the regularity of the diligence was well founded, they placed their judgment upon that ground; but refused to allow expenses to Greig and others, in respect of the mode in which the case had been pleaded.

Lyle's Authorities.—(1.)—Rankine, July 1. 1825, (ante, Vol. IV. No. 108); Lockhart, March 5. 1806, (16939); Adams, June 12. 1810, (F. C.); Hay, Dec. 15. 1820, (not rep.)—(2.)—54. Geo. III. c. 137. § 4; 33. Geo. III. c. 74; A. S. Dec. 14. 1805; Sampson, May 15. 1822, (ante, Vol. I. No. 464); Johnston, Feb. 10. 1821, (F. C.)

Greig and Others' Authorities.—(1.)—4. Stair, 22. 29; Rankine, July 4. 1823, (Lord Alloway); Craig, 244; 2. Stair, 3. 17; Bell on Purch. Title, 155.

G. DUNLOP, W. S.—J. GREIG, W. S.—Agents.

No. 411.

R. TAYLOR, Suspender.—*Jeffrey—Tait.*
JANET FERGUSON, Charger.—*Robertson—Donald.*

June 27. 1827.
1st DIVISION.
Lord Eldin.
D.

THIS was a question as to whether the charger had adduced a semiplena probatio of the suspender being the father of her child. The Justices of Ayrshire found that she had; but the Lord Ordinary altered, and suspended the letters; and the charger having thereupon reclaimed, and offered further proof, the Court remitted to the Justices to receive it.

J. MURDOCH, S. S. C.—J. C. TAIT, W. S.—Agents.

No. 412.

J. SMITH and J. TASKER, Suspenders.—*Sol.-Gen. Hope—Lothian.*
R. ROBERTSON and Others, Chargers.—*D. of F. Moncreiff—Small Keir.*

Clerk of Court—A. S. March 6. 1783—*Statute.*—In certain proceedings before a Justice of Peace Court, founded on a statute declaring their judgment final, the Clerk of Court having acted as agent of one of the parties, with the connivance of the opposite agent—Held,—1.—That the decree of the Justices and whole proceedings were null;—and,—2.—That the consent or connivance of the opposite agent was no bar to the objection being pleaded, and that it was pars judicis to notice it.

June 27. 1827.
2D DIVISION.
Ld. Mackenzie.

MESSRS. ROBERTSON and CANT, merchants in Perth, having taken a shop in Blairgowrie for the period of six weeks, with the view of establishing a branch of their business there, sent Smith,

one of their journeymen, and Tasker, an apprentice, with an assortment of goods to open the shop. On the same day on which the shop was opened, a petition was presented to the Justices of the Peace, in the name of Robertson and others, merchants in Blairgowrie, setting forth that Smith and Tasker had contravened the provisions of the Hawker and Pedlar's Act, by keeping an 'occasional shop' without a hawker's licence, and praying for warrant to have them brought up for examination, and convicted in the statutory penalty. Warrant was accordingly granted, and considerable procedure followed, in the course of which a proof was taken. Ultimately, however, the Justices found Smith and Tasker liable in the penalty of £25, and granted warrant for the sale of goods in the shop to that amount; and on an appeal to the Quarter Sessions, this judgment was adhered to. In all these proceedings the Clerk of the Justice of Peace Court had acted also as the agent of Robertson &c. He had drawn the original petition, and signed the various pleadings; he had also conducted the proof as their agent, and at the same time had acted as the Clerk of Court. No objection, however, was taken to this on the part of Smith and Tasker, except at discussing the appeal before the Quarter Sessions, when it was overruled. On the contrary, it appeared that in a letter by the agent of Smith and Tasker to the Clerk, complaining of too early a day being fixed for a diet to take the proof, he had stated, 'I make no objection to your being Clerk of Court and agent in the case at the same time; then why take me short? For it is me, and not my clients, who are aggrieved by so summary a diet being filled up.' But Smith and Tasker having brought a suspension of the decree of the Justices, besides maintaining certain pleas on the merits, they contended that the whole proceedings were illegal and inept, in consequence of the Clerk of Court having also acted as agent for the complainers.

To this it was answered,

1. That the suspension was incompetent, as the Justices of Peace were empowered 'finally to determine' questions arising under the Hawker and Pedlar's Acts.

2. That though the circumstance of a Clerk of Court acting as agent might subject him to certain penalties under the Act of Sederunt 1783, it did not render the proceedings void; and,

3. That the suspenders were barred from insisting on the objection, both by acquiescence and the express consent of their agent in the Inferior Court.

The Lord Ordinary, 'in respect it is admitted that the person 'who was employed by and acted for the chargers as agent in

'the Inferior Court in this cause, also was and acted in the same 'Court and cause as Clerk of Court;' found 'that the proceed-'ings were irregular and illegal,' suspended the letters simpliciter, and found the chargers liable in expenses. The Court unanimously adhered.

LORD JUSTICE-CLERK.—I should consider this to be a very important case indeed, if we could entertain the slightest doubt that the objection which is here founded on does not render the whole proceedings fundamentally null and void. The Act of Sederunt 1783 is merely declaratory of the common law; it established no new law, but only declared what must be the law of every wise judicature; and that Justices are to have as their clerk, on whose advice they must frequently lean, the agent of one of the parties who conducts his case, and at the same time draws the interlocutors, and advises the Justices, is so monstrous, and so contrary to the fundamental principles of justice, that it cannot be tolerated for a moment. It would not be a bit worse if the Justices themselves were to act as agents; and the Act of Sederunt being merely declaratory, we are bound to find that the whole proceedings rest on a corrupt basis. It is said that the opposite agent consented; but this just makes the matter worse. The two agents agree to accommodate each other, and sacrifice their client; and this shows the manifest iniquity which might result from the practice. It is, however, pars judicis to notice an objection of this kind; and although the party had waived it by an express entry on the record, the Court would have taken it up; but it appears in fact that the objection was stated at the Quarter Sessions. Without, therefore, entering into the merits, we must hold these proceedings to be null and void; and I hope this will be a warning to all such judicatories in future.

LORD PITMILLY.—I entertain entirely the same opinion. The consent of the opposite agent makes the matter worse, and is a pactum illicitum which we cannot countenance. If we listened to the plea that the proceedings were not rendered null, we would be lending ourselves to an evasion of the Act of Sederunt, which puts the Clerk of Court in the same situation with the Judge.

LORDS GLENLEE and ALLOWAY concurred.

D. GRAY, S. S. C.—J. BURNESS, S. S. C.—Agents.

No. 413.

J. BARCLAY, Pursuer.—*Sol.-Gen. Hope—Cockburn.*
W. D. GILLON and Others, Defenders.—*Skene—Maconochie.*

June 27. 1827.

2D DIVISION. Ld. Mackenzie. B.

CASE which had now resolved into a question of expenses. The Court found neither party entitled to them.

A. BURNS, W. S.—GIBSON-CRAIGS and WARDLAW, W. S.—Agents.

A. LAING and A. RHIND, Suspenders.—*D. of F. Moncreiff—Cuninghame.*
A. ANDERSON, Charger.—*Currie.*

No. 414.

Bill of Exchange — Proof — Relief. — Circumstances in which it was held,—1.—That two of four co-acceptors of a bill of exchange were not entitled to prove their defence against the claim of relief by a third, who had paid part of the bill, except by writ or oath; and,—2.—That one of three co-acceptors, who admitted that they were cautioners for a fourth, having paid part of the bill, was entitled to relief from the other two only pro rata.

June 27. 1827.
2D DIVISION.
Ld. Mackenzie.

ANDERSON, a joint acceptor, along with one Brander and the two suspenders Laing and Rhind, of a bill of exchange for £100 to the Farmers' Friendly Society of Elgin, having paid £63 of its amount, (the rest having been paid by Brander, who subsequently became bankrupt,) raised an action of relief against Laing and Rhind, concluding against them for payment of three fourth shares of this sum. In defence against this action, Laing and Rhind alleged that the bill was merely a renewal of a series of previous bills, on which they and Anderson were acceptors, originally granted for £100 borrowed by Anderson from the Friendly Society, in which they were merely cautioners, and that, on the last occasion of renewal, Brander's name had been obtained as an additional security to the Society, Anderson still remaining, as before, the real debtor. On the other hand, Anderson averred, That although the former renewals had been for a loan in which he was truly the debtor, yet, previous to the last renewal, and when he was about to pay up the loan, Brander had applied to have it transferred to him, and that this having been agreed to, the new bill was signed first by Brander as primary obligant, and by himself and the suspenders, all three being merely cautioners for Brander, though, on the face of the bill, the whole appeared as joint acceptors. In proof of this allegation, he appealed to the circumstance of his having been ranked as a creditor on Brander's estate, and to a letter which was written by him and Rhind, one of the suspenders, on the occasion of the partial payment made by Brander, and addressed to his agent, in these terms:—'As you 'have this day paid the treasurer of the Farmers' Society £45. 11s. '8d., as part of a bill granted to them by James Brander and us 'for £100, we declare the said James Brander relieved thereof.'

The Sheriff having found that the averments of the suspenders could only be proved scripto vel juramento, and decerned against them, conjunctly and severally, in terms of the libel, they presented two successive bills of advocation, which were refused by the Lord Ordinary, and on the decree being extracted, they brought this suspension, on the grounds,

1. That the privilege which entitled an ordinary holder of a bill to insist that proof of non-onerosity should only be by writ or oath, did not extend to the case of co-acceptors in questions of relief among themselves, and that they were therefore entitled to a proof of their averments prout de jure; and,

2. That at any rate, being cautioners along with the charger, they could only be decerned against each for one third share of the sum paid by him, there being no allegation that either of them was insolvent.

To this it was answered,

1. That the legal presumption arising from all the parties being joint acceptors on the face of the bill could only be redargued by writ or oath, and that this was res judicata in the present case by the refusal of the two bills of advocation; and besides, that the averments of the suspenders were disproved by the circumstances founded on by the charger in support of his allegations; and,

2. That the refusal of the bills of advocation formed res judicata as to this point also, and that the charger must be considered as in right of the bill, and entitled to proceed against all the parties appearing on the bill to be jointly and severally liable.

The Lord Ordinary, after granting a diligence to enable the suspenders to prove their averments scripto, found 'that the 'proof does not establish the averments of the suspenders, but 'that the charger, as one of three cautioners, having paid the 'debt, is not entitled to pursue the suspenders, as the other two 'cautioners, jointly for three fourth parts of the same, or even 'for two third parts of the same; but that as there is no allega-'tion of the insolvency of either of the suspenders, he is entitled 'to relief for only one third part of the debt from each of them.' His Lordship therefore found the letters orderly proceeded to that extent, and suspended quoad ultra.

The Court, by a majority, adhered.

A. Duff, W. S.—C. Gordon, S. S. C.—Agents.

No. 415. A. Kennedy and Others, Claimants.—*D. of F. Moncreiff—Greenshields—Currie.*
J. Wightman, Respondent.—*Sol.-Gen. Hope—G. Bell.*

Trustee.—Circumstances in which a gratuitous trustee under a deed of settlement was found personally liable for funds intromitted with by a co-trustee.

June 28. 1827.
1st Division.
Lord Eldin.
S.

The late Nicol Shaw executed a deed of settlement, by which he disponed his whole effects to his wife, David Williamson, merchant, and Thomas Williamson, writer, both in Dumfries,

and the respondent John Wightman, a farmer, as trustees for various purposes, and particularly for payment of certain legacies to themselves, and to Kennedy and others. The deed did not contain any clause exempting the trustees from being liable singuli in solidum, nor was any quorum appointed. On the death of Shaw in July 1808, the widow and the two Williamsons accepted of the office, and an inventory of the moveable effects was immediately made up, and a confirmation expede in favour of the whole trustees. In 1809 appearance was made by the trustees, including Wightman, in a precess of multiplepoinding before the Sheriff of Dumfries-shire, in which decree of preference was pronounced in their favour. Thomas Williamson died in 1810, and in 1811 part of the trust-property, consisting of a house and shop in Dumfries, was sold by the trustees to David Williamson, and of which the disposition was signed by Wightman, but no part of the price was paid. Again, in 1816, he concurred in granting two leases of part of the trust-property, and subscribed them as a trustee. The widow died in 1816, so that the only surviving trustees were Wightman and David Williamson. Diligence was in 1818 raised in name of these trustees against certain tenants, under which payment of the rents was recovered. In various other respects Wightman acted as a trustee, but he alleged that the management was taken entirely by David Williamson—that he subscribed his name to the deeds merely as a matter of form; and he denied that he had ever intromitted with any part of the trust-funds; and no evidence of such intromission was produced. Thereafter a process of multiplepoinding having been brought in name of Wightman and Williamson, an order of consignation was issued, but this was opposed by Wightman; and Williamson having become bankrupt, Kennedy and others claimed payment from Wightman personally of the funds which had been intromitted with by Williamson. This he resisted, on the ground that although the circumstance of subscribing the deeds and doing other acts might establish the fact of his being a trustee, yet as he was merely a gratuitous trustee, he could only be liable de dolo vel lata culpa, and could not be responsible for the consequences of the bankruptcy of his co-trustee.

To this it was answered,

1. That trustees under a deed of settlement are liable singuli in solidum, unless the trust-deed declares that they shall be liable only pro rata, or each for his own intromissions; and,

2. That trustees who are not so exempted are liable for the culpable omissions, as well as for the intromissions and unwarrantable acts of management of each other.

The Lord Ordinary, after issuing an interim decree against Wightman personally, in which he acquiesced, and on advising the report of an accountant, found him 'personally liable for the 'sum of £1434: 13: 7½ sterling, formerly found to be the amount 'of the trustees' intromissions with the trust-funds, and for in- 'terest thereof from the dates on which the sums composing that 'balance were due, as appearing from the report of the accountant 'in process, subject to deduction of the sum and interest for which 'Mr. Wightman was formerly found personally liable; and fur- 'ther found the said John Wightman personally liable to the 'claimants in the whole expenses of process incurred by them;' and to this interlocutor the Court adhered.

Lord Craigie.—I beg leave to enter my protest against the general doctrine maintained by the pursuers, that where there is no clause in a trust-deed declaring that the trustees shall not be liable singuli in solidum, they shall be responsible to that effect. If there be no such clause, we must go to the common law, the rule of which is, that, in order to establish such a liability, fraud must be proved, mere negligence not being sufficient. Accordingly Mr. Erskine lays it down in regard to a mandatory, that where no benefit accrues to him, he is liable for actual intromissions only, or for such diligence as he employs in his own affairs. In this case Wightman is a mere country farmer, and was no relation of the truster, who, it is evident, from having appointed a merchant and a writer along with him, both residing in Dumfries, expected that he should only give them his advice, and that the active management of his affairs should be taken by these persons. I therefore cannot hold this individual liable for their intromissions.

Lord President.—I agree with Lord Craigie as to the law of mandate, but that of trust is very different. The mandant is alive,—has the power of watching the acts of his mandatory,—and may recall his authority whenever he thinks fit; but, in the case of a mortis causâ trust, the truster is dead, and he has devolved his whole powers to his trustees, who are thus enabled to act without control. A much stricter rule must therefore be enforced against them than against a mandatory. But this person allowed his name to be used, whereby the other trustees were enabled to intromit with the funds; and when the case came into Court, and when Williamson was not bankrupt, he most improperly resisted the order for consignation, so that if he is obliged to pay, he has himself alone to blame.

Lords Balgray and Gillies concurred with the Lord President; and the former observed, that the general point had been decided by the House of Lords in the case of Dalrymple's Trustees.

Claimant's Authorities.—M'Clymont, Feb. 14. 1827, (ante, Vol. V. No. 219); Gray v. Gray's Trustees, 1819, (not rep.)

W. JOHNSTON, S. S. C.—W. STUART, W. S.—Agents.

J. WRIGHT, Suspender.—*A. M'Neill.*
J. M'GREGOR, Charger.—*Monteith.*

No. 416.

Master and Servant—Summary Imprisonment—Cautioner.—The master of an apprentice, whose indenture bound him to pay 2s., or work two days for each day he should absent himself, having caused the apprentice to be apprehended in consequence of a temporary desertion, but after he had returned to his service, and been imprisoned till he should find caution to implement his indenture; a friend having granted a bond of caution in order to obtain his liberation—Held, in a suspension by the cautioner of a charge given on the bond in consequence of an alleged second desertion, that the summary apprehension and imprisonment were illegal, and that the bond could not be enforced.

June 28. 1827.

2D DIVISION.
Ld. Mackenzie.
F.

THIS case having returned to the Lord Ordinary after the judgment pronounced ante, Vol. IV. No. 291, (which see,) it was contended by the suspender that he was entitled to have the letters suspended in toto, because, in the circumstances of the case, the bond of caution charged on was illegally obtained, in respect the charger was not entitled, under his indenture with his apprentice, Robert Wright, to apprehend him summarily, while actually at work with him, on account of a previous temporary desertion, and to have him imprisoned till he should find caution to implement the indenture. On considering this plea, the Lord Ordinary pronounced the following interlocutor:—'Finds that in the indenture 'between the charger and his apprentice, Robert Wright, there 'was a stipulation in the following terms:—'The said Robert "Wright binds and obliges himself, that for each day's absence, "excepting as aforesaid, he shall either pay to his said master 2s. "sterling, or shall serve him two days for one at the expiry hereof, "in the option of his said master, which absent days shall be suffi-"ciently verified and ascertained by the account thereof taken from "the books of the said John M'Gregor, and attested by his ma-"nager or clerk at the said field, or either of them:' Finds that 'this stipulation appears particularly to contemplate the case of 'temporary desertion, by the apprentice afterwards voluntarily re-'turning to his master's service; and finds that there is no stipula-'tion, that in the event of such temporary desertion, caution to 'any extent or effect shall be found by the apprentice: Finds 'that in the summary application to the Sheriff by the charger 'against this apprentice, no evidence was taken but the declara-'tion of the apprentice: Finds that by the declaration it ap-

'pears that the apprentice had deserted his master's service for a 'short time, but had returned thereto: Finds that, in these cir- 'cumstances, there were not sufficient legal grounds for compelling 'the apprentice, by summary imprisonment, to find caution, under 'a penalty, that he would implement the indenture: Therefore 'finds that the bond of caution granted by the suspender was 'questionable, and that the charge thereon ought to be suspended; 'suspends the letters simpliciter, and decerns; and finds the 'charger liable to the suspender in expenses.' To this interlocutor the Court unanimously adhered.

The LORD ORDINARY observed in a note:—A reduction in this case would only cause expense, and appears unnecessary. The bond of caution seems part of a judicial proceeding, the effect of which may be suspended at any time before complete implement. The Lord Ordinary considers this case special, and wishes to be understood as not giving any opinion against the legality generally of compelling, by summary imprisonment, an apprentice, who is in a state of desertion, to find caution to return to his master's service, and to serve out his term. The Lord Ordinary, as far as he recollects, was originally unwilling to force parties to discuss the legality of the Sheriff's warrant in this case, because the suspender alleged that, before suspending, he actually made a tender to implement his obligation of cautionary, by bringing back the apprentice, or paying fair damages for his desertion, and consequently had an advantage in not pleading, as he did not plead, his cause any higher.

The Judges concurred.

R. and A. KENNEDY, W. S.—C. FISHER,—Agents.

No. 417.

MURDO M'KENZIE.—*Buchanan—A. M'Neill.*

CAMPBELL M'INTOSH and Others.—*Skene—Robertson.*

Competing.

June 28. 1827.

2D DIVISION.

DECREE of preference in a multiplepoinding to the amount of a bond, with arrears of interest, not instructed to have been paid, the claimants preferred, who were executors of a party deceased, always confirming before extract.

LOCKHART and SWAN, W. S.—D. M'INTOSH, W. S.—Agents.

A. MELDRUM, Esq. Pursuer.—*Jameson—Hogg.* No. 418.
F. L. MAITLAND, Esq. and Others, Defenders.—*Jardine.*

Entail—Limited Fiar.—Held that a person possessing under an imperfect entail is not entitled gratuitously to increase the burdens, or impose additional restrictions on the heirs-substitutes, beyond those contained in the original entail.

June 29. 1827.
1ST DIVISION.
Lord Newton.
D.

IN 1738 James Makgill of Rankeillor executed a disposition of his whole lands to himself and the heirs of his body, whom failing, to Catherine, his eldest sister, and the heirs of her body; whom failing, to Isobel, his second sister, and the heirs of her body; whom failing, to John Makgill of Kembach, and the heirs of his body; whom all failing, to his own nearest heirs and assignees whatsoever; but this under certain reservations, provisions, and declarations which he ordained to be inserted in the titles, and which he declared should be the conditions under which the disponees were to accept of the lands. These conditions were in these terms:—'Providing always, as it is hereby expressly pro-'vided and declared, that the heirs of my body, and others above 'written, as well male as female, and the descendants of their 'bodies succeeding to the foresaid lands, baronies, and others 'above disponed, in virtue of the destination above written, shall 'be obliged to assume, use, and bear the surname, designation, 'and arms of Makgill of Rankeillor, as their proper surname, 'designation, and arms in all time coming: And when an heir-'female happens to succeed to the said lands and estate, who 'shall be at the time unmarried, then she shall be obliged to 'marry a gentleman of the surname of Makgill; or who, and the 'descendants of his and her body succeeding to the said estate, 'shall be obliged to assume, use, and bear the said surname, 'arms, and designation: And if the said heir-female so succeed-'ing shall happen to be married at the time of her succession, 'then her husband, and their heirs succeeding to the said estate 'conform to the foresaid destination, shall be holden, bound, and 'obliged to assume, use, and bear the said surname, designation, 'and arms of my family: And also with this provision, as it is 'hereby expressly provided and declared, that it shall not be leisome 'or lawful for the heirs above written, or any of them, to alter 'the destination above written by contract of marriage, or by 'any other deed gratuitously to disappoint the order of succes-'sion hereby established: And if any of said heirs, or descend-'ants of their bodies in all time coming shall do in the contrair 'of the conditions and provisions above expressed, then and in 'that case the contravener (but not the descendants of his or her

'body) shall ipso facto lose their right and title to the said lands 'and estate, and the same in that case shall fall, accresce, and 'appertain to the next heir who would succeed, if the contra- 'vener were naturally dead: And it shall be leisome and law- 'ful to the said next heir to establish the right thereof in his or 'her person either by adjudication, declarator, or serving heir 'to the person who died last vest and seised therein before the 'contravention, or any other habile way; and the person so 'succeeding upon the contravention, and the descendants of his 'or her body, shall be subjected to the same conditions and irri- 'tancies above expressed in all time coming.' The deed contained no other provisions or limitations of any sort.

Mr. Makgill died without heirs of his body, and titles were made up under the above disposition by his eldest sister Catherine. She afterwards acquired certain other lands, which she disponed to the same series of substitutes, and in precisely the same terms and under the same conditions as those contained in her brother's disposition, to which she referred. Having no issue, and her sister Isobel having a grand-daughter who was about to be married to the Honourable Captain Frederick Maitland, they bound and obliged themselves by the contract of marriage 'to do no act or 'deed whereby the succession to the estates of Nether Rankeillor 'and Lindores, conform to the settlement thereof made by the 'deceased James Makgill of Rankeillor, their brother, may be 'disappointed, or whereby the succession to the Cupar Muir 'Parks adjoining to Rankeillor, and now part of it, conform to 'the settlement made thereof by the said Mrs. Catherine Makgill, 'may be disappointed.'

On the death of Catherine, she was succeeded by her sister Isobel, who made up titles to the lands in terms of her brother and sister's dispositions. She then executed a disposition in favour of her grand-daughter Mrs. Maitland Makgill, on the narrative and in terms of her brother and sister's dispositions; and in virtue of this deed Mrs. Maitland Makgill made up titles to and enjoyed possession of the estates. As there was no effectual prohibition against contracting debt or selling the estate, Mrs. Maitland Makgill conceived that she was entitled to make an entail of the estate conformably to the dispositions of her brother and sister, and to impose additional fetters and restrictions upon the substitutes. She accordingly, in 1819, executed a deed of entail, placing additional burdens and restrictions upon the heirs; and, among others, she ordained the heir in possession to pay over a fourth of the free rents of the estate to trustees, (whom she nominated by a separate deed,) prohibited him from selling or con-

tracting debt, and fortified the various conditions and prohibitions with irritant and resolutive clauses. At the same time she executed a disposition, by which she conveyed part of the lands, and also one-fourth of the free rent of the whole estates, to trustees, for payment of debts, and of provisions to her younger children. On her death in 1825, Mr. David Maitland Makgill, her grandson, (who was heir apparent under the former investiture,) granted a trust-bond to the pursuer, under which he adjudged the lands from him, as lawfully charged to enter heir to his grandmother, and thereupon instituted an action of reduction, concluding that the deed of entail executed by Mrs. Maitland Makgill should be set aside in toto, and that the trust-deed should be reduced so far as it contained a disposition of the lands and of the rents.

In defence it was maintained,

1. That an heir of destination, unless placed under restrictions guarded by the statutory clauses requisite for creating a proper jus crediti in the heirs-substitutes, is as much an absolute proprietor as the entailer himself; and therefore there was nothing to prevent Mrs. Maitland Makgill from executing an entail of the estate, more especially as she not only did not contravene the prohibitions in the investiture, but had merely made provisions for carrying into effect the will of the entailer; and,

2. That with regard to the trust-deed, as the object of it was to accomplish the discharge of onerous debts, and secure moderate provisions to the younger children of Mrs. Maitland Makgill, and as she was not debarred from burdening the estate to that extent, the deed was effectual.

To this it was answered, That an heir in possession under an imperfect entail, whatever may be his powers in reference to third parties, is bound by the conditions of the grant in all questions with the other heirs:—that as he takes and enjoys under the conditions of the deed, he is bound to respect these conditions, and has no power gratuitously to add to the burdens imposed by the entailer; and therefore that both the deeds of entail and of trust were ultra vires of Mrs. Maitland Makgill.

The Court, on the report of the Lord Ordinary, unanimously decerned in terms of the libel.

Lord President.—The defenders have no case at all; and indeed, after the various decisions upon this question, we must regard it as settled, and are not entitled to open it up.

The other Judges concurred.

Pursuer's Authorities.—2. Bank. 3. 133; Halket, Feb. 16. 1662, (15416); Gordon, Jan. 25. and Aug. 2. 1771, (15579); Menzies, June 25. 1785, (15436); Campbell, June 28. 1815, (not rep.); Argyle Entail, Dec. 15. 1820, (not rep.)

MACKERSY and ROY, W. S.—J. HERIOT, W. S.—Agents.

No. 419.

J. TAYLOR and SONS, Pursuers.—*Jeffrey—Hoplrirk.*
R. HALL and Others, Defenders.—*Sol.-Gen. Hope—D. M'Neil.*

Recompense—Bankrupt.—Held that a committee of creditors appointed by the creditors to manage the affairs of a bankrupt estate, are not entitled to charge a commission on their disbursements and for their actings.

June 29. 1827.

1st DIVISION. Lord Newton. S.

THE affairs of Taylor and Sons having become embarrassed, a meeting of their creditors was held, at which Hall and others were appointed a committee of management. They accordingly acted as such, and in the course of doing so they came under personal obligations to the Earls of Hopetoun and Rosebery for rents of farms held by Taylor and Sons, amounting to upwards of £300, and they granted a bill for £1945, which they discounted at a banking-office on behalf of the estate. Their management was put an end to by a sequestration under the Bankrupt Act, which was awarded against Taylor and Sons. In rendering their accounts, they took credit for a commission of £215, being five per cent. on their disbursements, amounting to £4088: 13: 4. The trustee was appointed by the creditors to relieve them of their obligations, and to settle with them in terms of their account. This having been done, and Taylor and Sons having thereafter settled by a composition, and having been discharged, they brought an action of accounting against Hall and others, in which the only general point raised related to their right to the commission, for which the committee, with the exception of a Mr. Muir, insisted. The Lord Ordinary having remitted to Mr. Paul, accountant, to consider this and other matters, he reported that it was his opinion 'that the committee 'ought to be allowed a compensation for their trouble, but that 'their commission, instead of being stated at five, ought to be at '2½ per cent.; and his opinion on the general point that an allow-'ance should be made rests on these grounds,—that while the or-'dinary rule undoubtedly is, that committees of creditors receive 'no remuneration for their trouble, that circumstance arises from 'the nature of the duty committed to them, which is to superin-'tend, and not to labour,—to make general examinations, and to 'report,—not to conduct, settle, and incur the responsibility of im-'portant transactions: That the present case, therefore, in which

'the committee not only did all the ordinary duties of a trustee, 'but interposed their personal credit for the benefit of the bank-'rupt estate, seems to be clearly an exception to the common rule, 'and that two or three cases of a similar kind, in which an allow-'ance was made to committees, have come within the knowledge 'of the accountant.'

The Lord Ordinary 'approved of the report, with the excep-'tion of the commission allowed to the defenders, and of new 'remitted to the accountant to modify the same in consistence 'with the views expressed in the note subjoined.' That note was in these terms:—'As it appears to the Lord Ordinary that the 'committee did not confine themselves to superintending the bank-'rupts in their management of the estate, but took an active 'charge, incurring considerable personal responsibility, he agrees 'with the accountant in thinking it reasonable that some remu-'neration should be allowed for their trouble; but as their claim 'stands on a very different footing from that of a factor or trus-'tee, he thinks the rate of 2½ per cent., adopted by the account-'ant as the rule of calculation, quite sufficient. It appears to 'him, however, that the sum on which the commission is to be 'calculated must be reduced considerably below that assumed 'in the report. Thus he conceives, in the first place, that no 'commission can be allowed on the 2d article of the charge, be-'cause he understands this article of £215: 3: 9 to be the com-'mission paid to the defenders by the trustee. 2d, As it seems 'unreasonable that the estate should be subjected to pay com-'mission twice on the same sums, the committee ought not to re-'ceive any on such bills and acceptances as they merely handed 'over to the trustee, or on any sum for which he has received or 'was entitled to charge commission. 3d, Mr. Muir's declining to 'take any commission must, in the Lord Ordinary's opinion, be 'held to operate, not in favour of his co-commissioners, but of 'the creditors at large; of course, each of the others should be 'credited with one-fourth of the commission only.'

Taylor and Sons having reclaimed, the Court altered, and found no commission due.

Lord Balgray.—This is a very general question, and of consider-able importance. I doubt extremely whether a committee who are elected by a set of creditors are not understood invariably to act gratuitously. If they stipulate for a remuneration from the creditors, good and well; but where, as in this case, they are all in one boat, and endeavouring to extricate themselves from the general wreck, I do not think that they are entitled to demand a recom-pense. They must unquestionably be kept indemnes, and accord-

... ingly this committee were relieved from all responsibility. Indeed their responsibility was little or nothing, because they interposed merely as a committee, and of course had their relief against the other creditors.

Lord Gillies.—I am of the same opinion. If those who are selected to attend to the affairs do not stipulate for a reward, they cannot charge it. In all such cases, some who are more able than others take the active management; but I never heard of such a claim as this being made.

Lord Craigie.—The case may be different where a person peculiarly versant in any particular matter is employed by the creditors; as, for example, a writer to the signet or an accountant; but I agree as to the general rule which has been laid down.

The Lord President concurred.

G. M'Callum, W. S.—A. Douglas, W. S.—Agents.

No. 420.

Colonel M'Innes, Raiser.—*A. Bell.*
Trustees of Mrs. Frances M'Allister.—*Greenshields.*
Mrs. Flora M'Allister, &c.—*Sol.-Gen. Hope—M'Neil.*
Trustees of Angus M'Allister.—*Rutherfurd.*
Mrs. M'Donald and Others.—*Fletcher.*
Colonel M'Allister.—*D. of F. Moncreiff—Jameson.*
Trustees of General Keith M'Allister.—*Skene—H. J. Robertson.*

Competing.

Testament — Foreign — Interest. — 1. — Interpretation of a will executed in India. 2. — Interest on legacies bequeathed by such a will due from twelve months after the testator's death.—3.—Rate of interest on such legacies.—4.—On whom expense of remittance from India falls.

June 29. 1827.

1st Division. Lord Meadowbank. D.

The late Colonel Norman M'Allister, a native of Scotland, in the East India Company's service, and Governor of Prince of Wales' Island, where he was domiciled, was lost at sea in the month of August 1810, in the course of a voyage from that island to China, with the view of returning to Britain. By consent of parties, his death was held to have taken place on the 15th of that month. He had no lawful issue; but he had two natural daughters, Frances and Flora. He had three brothers, (of whom he was the youngest,) Alexander, Major General Keith, and Colonel Matthew; and he had also several sisters, and in particular Susanna and Margaret, the wife of Mr. M'Donald. He left a will, dated at Prince of Wales' Island, written by himself in the English form, with a relative codicil and letter of instructions;

but neither the codicil nor the letter entered into the present question. The will, so far as material, was in these terms:—'I give and 'bequeath to each of my sisters Susanna and Margaret £200 ster-'ling each, with an additional sum of £200 sterling to be given 'to Margaret, which, with the aforesaid £200, is to be settled upon 'herself for life. I give and bequeath to my daughter Frances the 'sum of £15,000 sterling. The said Frances M'Allister is now in 'England, and goes by the name of Frances Johnstone—a cir-'cumstance known to my brother Keith. I give and bequeath 'to my daughter Flora M'Allister the sum of £10,000 sterling. 'The said Flora M'Allister is now in England, and goes by the 'name of Flora Scott. She is under the care of my friend Wil-'liam Burnie, Esq. The fortune which I thus bequeath to each 'of the above-mentioned children, the said Frances M'Allister 'and Flora M'Allister, is to be left bearing interest in India, and 'placed in the hands deemed the most safe by the trustees, who 'will take care that collateral security be taken for the whole 'property invested in this way, which is to be left to accumulate 'for the benefit and behoof of the said children until they are '20 years of age. At the same time as much of the interest of 'their fortune is to be remitted to England annually as shall de-'fray the expenses of their education, provided that the sum re-'quired shall not exceed £300 sterling, for education and main-'tenance together, until they are 14 years of age; and after they 'have attained that age (14), should their guardians, who shall 'be hereafter mentioned, deem it necessary, they are then to re-'ceive each £300 sterling annually until they are 20 years of 'age, when more may be allowed them, should their guardians 'deem it necessary. In the event of the death of the said Frances 'M'Allister without lawful male heirs, her sister Flora M'Allister 'is to inherit and receive the whole and every part of the said Frances 'M'Allister's fortune; and in the event of the death of Flora 'M'Allister without lawful male heirs, the above-mentioned Fran-'ces M'Allister is to inherit and receive the whole and every part 'of the said Flora M'Allister's fortune; and in the event of the 'death of both these, Frances M'Allister, and Flora M'Allister 'her sister, and failing of them both and their lawful male heirs, 'I bequeath the whole and every part of the fortune of Frances 'M'Allister and Flora M'Allister to my brother Keith M'Allister 'and his lawful male heirs.' There then followed a series of substitutes, and a nomination of executors and guardians to his daughters, after which the deed proceeded as follows:—'Should Frances 'M'Allister or her sister Flora M'Allister marry before they are '20 years of age, they will forfeit the whole and every part of

'their fortune bequeathed to them by me; and after the said 'Frances M'Allister and Flora M'Allister are 20 years of age, 'they may then marry; but whomsoever they marry must have 'the full consent and approbation of two of the trustees and 'guardians above named, otherwise they forfeit every shilling 'of the fortune bequeathed to them by me. And whomsoever 'the said Frances M'Allister and Flora M'Allister marries, after 'they are 20 years of age, with the full consent and approba-'tion of two of their trustees and guardians, shall and will take, 'and shall continue hereafter lawfully, him and his lawful heirs, 'both male and female, to take the name of M'Allister; otherwise 'the above-named Frances M'Allister and Flora M'Allister, and 'their husbands, and their male and female heirs for ever, shall 'forfeit the whole and every part of the fortune bequeathed to 'them by me in this or other will or wills: Provided, how-'ever, that the above-named Frances M'Allister and her sister 'Flora M'Allister have the full consent and approbation of the 'majority present of their trustees, not less than two, to marry 'at the time above specified, they will, and in that case have the 'whole sums heretofore mentioned and bequeathed to them by 'me; which sums, however, are to be invested by the trustees 'and guardians in purchasing lands in Argyleshire, if possible to 'be procured in that county; which lands are to be entailed on 'the male heirs of the two sisters, the above-named Frances 'M'Allister and Flora M'Allister. I leave and bequeath to my 'brother Keith £10,000 during his life, which sum is afterwards 'to revert to Frances M'Allister and male heirs. I bequeath to 'my brother Matthew M'Allister the sum of £5000 sterling dur-'ing his life, which is afterwards to revert to Flora M'Allister 'and male heirs; failing them, to Frances M'Allister.' After some other legacies, the will proceeded in these terms:—'I give 'and bequeath the whole and every part of my landed property 'and estates of Kernhill, with any other lands that I may have, 'to my daughter Frances M'Allister and her lawful male heirs; 'and failing of the said Frances M'Allister and her lawful male 'heirs, I bequeath the above-named estate and lands of Kernhill 'to my daughter Flora M'Allister and her lawful male heirs; 'and failing of them, I bequeath the above-named estate and 'lands of Kernhill, together with every other part of their pro-'perty, to my brother Keith M'Allister and his lawful male 'heirs; and failing of them, I bequeath the above-named estate 'and lands of Kernhill to my brother Matthew M'Allister and 'his lawful male heirs; and failing of them, I bequeath the estate 'and lands of Kernhill to my nephew John M'Allister and his

'lawful male heirs; which, however, I have now burdened with '£100 sterling a year for life to my sister Peggy. All the rest 'of my property, with whatever may fall or become due to me, 'I bequeath and give to my brother Keith.'

Under this deed, the pursuer Colonel M'Innes, Captain John M'Allister, and General Keith M'Allister, were appointed executors,—the two former of whom were to administer to the funds in the East Indies, and the latter in Britain. The funds, however, were situated entirely in India.

The executors in India proceeded to realize the estates by converting them into cash, and investing them in promissory notes of the East India Company. In doing so, they employed the house of Fairly, Fergusson, and Company of Calcutta as their agents, who opened three accounts in their books,—one for the estate of the testator,—another for the executors in account with Miss Frances M'Allister,—and the third between them and Miss Flora. To the credit of that of Frances they placed promissory notes to the amount of £15,000, and to that of Flora £10,000, with interest from the date of the death of the testator. These accounts, however, the executors stated, were opened merely to enable them to have a more distinct idea of the matters placed under their management, and not as a separation of the funds affecting the rights of these ladies. In making the conversion from sicca rupees into sterling money, the executors estimated the sicca rupee at 2s. 6d. sterling, which was the rate of exchange adopted by the East India Company.

On attaining the age of 20, Frances and Flora M'Allister, with the requisite consent, entered into marriages,—the former with Angus M'Allister of Balinakil,—and the latter with Keith M'Donald M'Allister. Contracts of marriage were at that time respectively executed and ratified by them when they attained the age of 21. Frances, by her contract, conveyed the whole interest which she then had under the will to trustees, excepting the lands of Kernhill or Clahaigh, but reserving £2000 (afterwards limited to £1500) for outfit to herself and husband, and provisions to a certain extent in favour of the children of the marriage; but always provided that the same should be agreeable to the will. In like manner Flora, by her contract, conveyed to trustees, in similar terms, the whole interest which she then had under the will. Thereafter the husband of Frances having become insolvent, she, along with him, executed a conveyance to trustees for his creditors of her whole means and effects not included under the disposition in the marriage-contract, and she soon afterwards died without male issue, but leaving a daughter.

In the mean while, Colonel Matthew M'Allister, who was the heir of conquest of his brother, and as such entitled to succeed to Kernhill, made up titles to it in that character, and in a process which was brought against him, it was found that he had thereby forfeited all right to the liferent of the £5000 provided by the will.*

Various disputes having arisen as to the respective rights of the parties under the will, Colonel M'Innes, as the surviving executor, (the other executors, General and Captain M'Allister, being both dead,) raised a process of multiplepoinding. In this process appearance was made for the trustees under the contract of Mrs. Frances M'Allister—for those under the trust-conveyance by her to her husband's creditors—for Mrs. Flora and her trustees—for Mrs. Margaret M'Donald, the sister of the testator—for Colonel Matthew M'Allister—and for the trustees and executors of Major General Keith M'Allister, the residuary legatee.

After repelling an objection to the jurisdiction of the Court, the Lord Ordinary appointed the opinions of Mr. Solicitor-General Copley, Mr. Sergeant Bosanquet, and Mr. Shadwell, to be taken as to the import and effect of the will on the rights of the parties under the English law. These opinions having been obtained, his Lordship then reported the cause upon Cases, in which the following questions were discussed:—

1. Whether there had been an effectual separation or transfer from the general mass of the legacies of £15,000 and £10,000 provided to Frances and Flora, by the accounts having been opened by the executors with their agents in India?

The Court found, 'That no effectual separation or transfer has 'been made, in terms of the will of Governor M'Allister, of any 'part of the sums bequeathed to the late Frances or to Flora 'M'Allister from the mass of the testator's fortune, and that no 'particular fund or securities have been effectually appropriated 'for the payment of these bequests.'

2. At what rate, and at what time, the conversion into sterling money was to take place; and whether the legatees were entitled to Indian interest, and the accumulations thereof made while the funds were in India; and if so, whether that interest was to be calculated from the day of the death of the testator, or whether, according to the English rule, it was due from a twelvemonth after that period; and further, whether the expense of remittance was to fall upon the particular, or on the residuary legatee?

The Court found, 'That a sum of sicca rupees, equivalent to

* See the next Case.

'£15,000 sterling, according to the current rate of exchange as 'it stood on the 15th of August 1810, which has been held as 'the day of the testator's death by the consent of parties, with 'a proportion corresponding thereto of the accumulations of in- 'terest actually made on the testator's fortune in India from that 'date till Frances M'Allister attained the age of twenty years, '(deducting from the said interest and accumulations all pay- 'ments duly made on her behalf,) must be remitted to Scotland 'at the expense of the legatee,—such expense to be paid out of 'the said accumulated fund, in order to ascertain the amount to 'be invested in the purchase of lands, as after mentioned: That 'a sum of sicca rupees, equivalent to £10,000 sterling, according 'to the current rate of exchange on the day of the testator's death 'as before mentioned, with a proportion corresponding thereto of 'the accumulations of interest actually made on the testator's for- 'tune in India from that date till Flora M'Allister attained the 'age of twenty years, (deducting in like manner from the said 'interest and accumulations all payments duly made on her be- 'half,) must in like manner be remitted to Scotland at the ex- 'pense of the legatee,—such expense to be paid out of the said 'accumulated fund, to be also invested in the purchase of, and 'as after mentioned.'

3. Whether the sums of £15,000 and £10,000 vested absolutely in each of Frances and Flora; or whether they were to be invested in lands under a simple destination in terms of the will, or in those of a strict entail?

The Court found, 'That Frances M'Allister, who married 'with the consent required in the will of the testator, having died 'without male heirs, and Flora M'Allister being also married 'with consent as aforesaid, the said two sums of £15,000 and '£10,000, with the said respective accumulations thereon, under 'the deduction foresaid, must be invested by the executors of the 'testator in the purchase of lands in Argyleshire, if possible to 'be procured in that county, to be settled upon the said Flora 'M'Allister and her heirs-male, under the fetters of a strict en- 'tail, as understood in the law of Scotland, the deed to be pre- 'pared at the sight of the Court; and find it unnecessary, hoc 'statu, to give any directions as to the extent of the destination 'to be inserted in the said deed, or as to any other particulars 'thereof.'

4. Supposing that the ladies had not such an absolute right in the principal sums, whether the interest belonged to them; and if so, how long were they to be entitled to draw Indian interest? And if they were to draw British interest, whether it was to be at the

rate of four per cent., according to the rule of the Court of Chancery in England, or of five per cent.?

The Court found, 'That the executors of the testator must, 'out of the trust-estate, account for the interest actually made in 'India on the said sum of £15,000, and accumulations corresponding thereto, under the deductions foresaid, from the period 'when the said Frances M'Allister attained the age of twenty, '(when the said accumulations for the purchase of lands shall 'stop,) until the same shall be remitted to Scotland, (the expense 'of which remittance to be paid by the particular legatee,) and 'at the rate of four per cent. per annum from that period, until the 'same be invested in land as aforesaid, or consigned in one or 'other of the chartered banks: That the said executors of the 'testator must, out of the trust-estate, account for the interest 'actually made in India on the said sum of £10,000, and accumulations corresponding thereto, under the deductions foresaid, from the period when the said Flora M'Allister attained 'the age of twenty, (and when the said accumulation for the purchase of lands shall stop,) until the same shall be remitted to 'Scotland, (the expense of which remittance to be paid by the 'particular legatee,) and at the rate of four per cent. per annum 'from that period until the same be invested in land as aforesaid, 'or until the same be consigned in one or other of the chartered 'banks.'

5. On the supposition that the principal sums did not belong to Frances and Flora, and that the interest did, whether that interest had been effectually conveyed to the trustees under their contract of marriage?

The Court found, 'That the said interest accruing on the 'former of these accumulated sums from the time that the said 'Frances M'Allister attained the age of twenty to the period of her 'death, belonged to her absolutely, and was effectually conveyed 'to the trustees under her contract of marriage; and that the interest accruing thereon, subsequent to the death of the said 'Mrs. Frances M'Allister, and also the whole interest accruing 'on the latter of the said accumulated sums from the time when 'the said Flora M'Allister attained the age of twenty, until both 'the said accumulated sums shall be invested in land as aforesaid, belong absolutely to the said Flora M'Allister, and were 'effectually conveyed to the trustees under her contract of marriage.'

6. As a separate sum of £10,000 had been bequeathed to Frances, subject to the liferent of General Keith M'Allister, and as he was now dead, in what manner were the respective rights

of the executors of the General and Frances in that fund to be disposed of, and at whose expense was it to be remitted from India?

The Court found, 'That the sum of £10,000 sterling be-'queathed to Frances M'Allister, subject to the liferent of Gene-'ral Keith M'Allister, was payable to her in Great Britain, in 'sterling money, as on the 9th March 1820, being the date of 'the said General Keith M'Allister's death,—the expense of remit-'tance falling upon the residuary legatee,—and that interest of the 'said sum at the rate of four per cent. per annum from the 15th of 'August 1811, being a year after the date of the testator's death, 'down to the said 9th March 1820, is payable to the trustees 'of the said General Keith M'Allister, and that the said sum of '£10,000 itself, with interest thereof at four per cent. per annum, 'from the said 9th March 1820, belonged absolutely to the said 'Frances M'Allister, and was effectually conveyed to her said 'trustees under her contract of marriage.'

7. Whether the marriage-contract of Frances was effectual so far as related to the provisions of outfit for herself and husband, and for her children?

The Court found, 'That the sum of £2000 provided in the 'said Frances M'Allister's marriage-contract, afterwards restrict-'ed to £1500, for outfit, as also the provisions to daughters and 'younger sons, contained in the said contract, are legal and com-'petent, and consistent with the foresaid last will, and the same 'are payable out of any funds over which the trustees of the said 'Frances M'Allister has an uncontrolled or unrestricted power.'

8. As the right of Colonel Matthew M'Allister to the liferent of the £5000 had been declared forfeited in consequence of taking up the estate of Kernhill, whether that £5000 was to be regarded as a surrogatum for the estate? And if so, whether that liferent interest did not belong to Frances during her life, and fell under the conveyance to the trustees for her husband's creditors, (as having been excepted from her marriage-contract,)—and whether, by the death of Frances without male heirs, the liferent now belonged to Flora and her trustees;—and, separately, at whose expense the £5000 were to be remitted from India, and at what rate and from what time was the interest to be payable? And,

9. Whether the annuity of £100 in favour of Mrs. M'Donald was a subsisting right; and whether it was payable out of the interest of the £5000, or from what other fund?

On these points the Court found, 'That the sum of £5000 be-'queathed to Flora M'Allister, subject to the liferent of Colonel

'Matthew M'Allister, is payable in Great Britain in sterling 'money, the expense of remittance falling upon the residuary 'legatee:—that Colonel Matthew M'Allister, having taken the 'estate of Kernhill, forfeited his liferent interest in the said sum 'of £5000, and therefore repel his claim thereto in this process; 'and find that the said liferent interest so forfeited by him de- 'volved upon Frances M'Allister during her life, and after her 'death devolved upon and now belongs to Flora M'Allister and 'her male heirs; and that so much of the said liferent as de- 'volved upon the said Frances M'Allister does not fall under 'the conveyance in her contract of marriage, but is payable to 'the trustees of her husband and his creditors, subject to the 'burden or deduction after mentioned:—that the said sum of '£5000 bears interest at the rate of four per cent. per annum 'from the 15th August 1811, being a year after the date of the 'testator's death:—that the annuity of £100 per annum provided 'to the testator's sister, Mrs. Margaret M'Donald, and declared 'to be payable out of the lands of Kernhill, must now form a pre- 'ferable claim against and burden on the forfeited life interest 'of the said sum of £5000, and is payable to her in Scotland, 'free of the burden of the expense of remittance, during her na- 'tural life, or so long as the forfeited liferent interest of Colonel 'Matthew M'Allister in the said £5000 shall be sufficient to 'answer said annuity,—beginning the first term's payment of 'said annuity on the 15th day of August 1812 for the year 'immediately preceding:—that the burden of the said annuity 'must be borne by the trustees for the husband of the said 'Frances M'Allister and her creditors, and by the said Flora 'M'Allister and her male heirs, according to their respective in- 'terests in the said forfeited life interest; and remit to the Lord 'Ordinary to ascertain and fix the proportions in which the bur- 'den of the said annuity is to be so borne by them: Find that 'the said sum of £5000, upon the death of the said Colonel 'Matthew M'Allister, will devolve upon the said Flora M'Al- 'lister in terms of her father's settlement; and that the same, 'being a reversionary right, was not affected by the conveyance 'in her marriage-contract.'

10. Whether the contracts of marriage were binding,—the English lawyers being of opinion that in England they would not be so?

The Court found, 'That the above two contracts of marriage 'of the said Frances and Flora M'Allister, duly confirmed by 'them, are valid and effectual deeds to all intents and purposes 'whatever.'

Lastly, Whether a double legacy, each of £200, or only one, had been provided to Mrs. M'Donald; and if so, whether her right had fallen to her husband; and whether certain payments made to her under peculiar circumstances by her brother, the residuary legatee, were to be imputed in extinction of the legacies, or not?

The Court found, 'That the said Mrs. Margaret M'Donald 'is entitled to two legacies of £200 each claimed by her, with 'interest at the rate of four per cent. from the said 15th day of 'August 1811, being a year after the testator's death; and that 'these two sums of £200 each, and interest thereof as aforesaid, 'must be remitted to Scotland at the expense of the residuary 'legatee; and that the said two sums, and interest thereof, are 'payable to the said Mrs. Margaret M'Donald herself, and 'do not fall under the jus mariti of her husband: Repel the 'plea of compensation or retention made on the part of General 'Keith M'Allister's trustees, founded upon the sums paid by 'him, or on his account, during his life, to the said Mrs. Mar-'garet M'Donald; and remit to the Lord Ordinary to apply the 'above findings to the claims of the several parties, and to cause 'a state of the funds, and of the interests of the parties, to be 'made up conformably thereto, and to rank and prefer them for 'the respective sums due to them accordingly.'

MACKENZIE and INNES, W. S.—J. W. M'KENZIE, W. S.—M. N. M'DONALD, W. S.—E. HOGGAN, W. S.—J. BURN, W. S.—CAMPBELL and CLASON, W. S.—J. BRIDGES, W. S.—Agents.

Col. M. M'ALLISTER, Pursuer.—*D. of F. Moncreiff—Jameson.* TRUSTEES of Mrs. FLORA M'ALLISTER, Defenders.—*Sol.-Gen. Hope—M'Neill.*

No. 421.

Decree in Foro—Res Judicata.—A legacy having been left under an English will to the heir of conquest of the testator, who by the same will ineffectually bequeathed his landed estate in Scotland to another party; and the heir having taken up the estate, and an action having been brought against him, concluding that he should denude of the estate, or otherwise have his right to the legacy declared forfeited; and having been allowed to take the opinion of English counsel to show that his right was not forfeited; but not having done so, and having relied on information from an English solicitor that his right was forfeited; and having thereupon moved for and obtained absolvitor from the conclusion for denuding, and decree against him of forfeiture of the legacy—Held not entitled to open up the decree, on the allegation that the information of the solicitor was erroneous.

THIS case was connected with the preceding one. By the will of Colonel Norman M'Allister, he bequeathed 'to my brother 'Matthew the sum of £5000 sterling during his life, which is 'afterwards to revert to Flora M'Allister and her male heirs, and

June 29. 1827.

1ST DIVISION. Lord Meadowbank. D.

'failing them to Frances M'Allister;' and the testator, by the same deed, bequeathed his estate of Kernhill or Clachaig to them and a series of substitutes. As that estate had not been effectually disponed to them, and Colonel M'Allister was the heir of conquest, he made up titles, and took the estate in that character. These ladies, together with General Keith M'Allister, (one of the executors, and the residuary legatee under the will,) then brought a summons of declarator against the Colonel, concluding that he should either be bound to denude of the 'lands of Clach-'aig in favour of the two ladies, in terms of the destination of the 'will; or otherwise, in the event that he should be found entitled 'to refuse to do so, that it ought to be declared that the said Mat-'thew M'Allister, his heirs and successors whatsoever, have, by 'so doing, forfeited and lost all right, title, and interest in and to 'the said last will and settlement, codicil, and letter of instruc-'tions, or to any legacies, bequests, provisions, and destinations, 'or any clauses of any description conceived, and to all sums of 'money, estate, and effects whatsoever, heritable or moveable, 'real or personal, thereby in any way left or conveyed, directly 'or indirectly, immediately or eventually, to and in favour of 'him, or of his foresaids, in any way, or in any event whatsoever; 'and that neither he nor any of his foresaids can, in any event, 'claim the same, or any of them, or take any benefit whatsoever 'under the said last will and settlement, or letter of instructions 'relative thereto.'

In defence, Colonel M'Allister pleaded, That although he had obtained possession of the estate, yet it did not follow that he was bound to renounce his rights under the will, and particularly his right to the legacy.

Lord Pitmilly appointed a Case to be prepared, in order 'to 'obtain thereon the opinion of one or more English counsel on 'the will of Colonel M'Allister, with reference to the second or 'alternative conclusion of the libel.' A Case was accordingly prepared, and transmitted to a solicitor of great experience and high respectability in London, who, on perusing it, wrote to the pursuer's agents that a similar case had recently been decided in England adverse to his plea; and after referring to certain other cases, he observed, that 'I consider it now as quite settled, ad-'versely to your client, Colonel M'Allister, that one cannot act 'adversely to a will or the intention of a testator by taking, on 'account of its informality or otherwise, what was meant for an-'other, and at the same time take benefit from another part of 'the same instrument. I am therefore of opinion that it is vain 'for your client to contest the point. Were it my own case, I

'would not be at the expense of feeing counsel in it. However, 'if the client or you think otherwise, I see no objection to the 'counsel proposed.' In consequence of this opinion, Colonel M'Allister lodged a minute, in which he stated that he had come 'to the resolution of allowing the pursuers to take the benefit of 'the will as to the other provisions, provided they allowed decreet 'to go out, finding that the defender was entitled to take up 'the estate of Clachaig and others, as described in the summons, 'and that the same are now absolutely and irredeemably his pro-'perty.'

To this it was answered for Frances and Flora M'Allister and their tutor ad litem, That as they were under age, they could not enter into the proposed agreement, but they left the case to be disposed of by the Lord Ordinary. His Lordship, in consequence, decerned 'in favour of the pursuers, in terms of the second or 'alternative conclusion of the libel, for having it found that the 'defender, by refusing to denude of the lands of Kernhill or 'Clachaig, has forfeited all right and interest to the last will and 'settlement libelled.' As his Lordship had not assoilzied him from the first conclusion, the Colonel gave in a representation on that point, in consequence of which, his Lordship assoilzied him from that conclusion. He afterwards discovered that General Keith M'Allister had died on the day when the interlocutor was pronounced, and to obviate any objection, he raised a process of wakening and transference against his trustees, and obtained decree in absence of transference in statu quo.

In the mean while Frances had married, and the trustees under her marriage-contract, but not her husband, entered appearance. By a mistake, the trustees of General M'Allister, who had not appeared, were sisted in place of them. An interlocutor was then pronounced, of new assoilzieing the Colonel from the first conclusion, and decerning in terms of the second, whereby his right under the will was declared forfeited.

When the opinion of counsel was taken in the preceding case as to the effect of the law of England on the rights of parties under the will, they stated that they were of opinion 'that the life 'interest given to Colonel Matthew M'Allister in the £5000 has 'not been forfeited by him by his succession to the real property 'mentioned in the will. The will has not in express terms raised 'a case of election; and it is a rule of the English law, that where 'a will, imperfectly executed, does not in express terms raise a 'case of election, an heir at law is not put to his election merely 'because he is made a legatee.'

In consequence of this opinion, Colonel M'Allister raised a

summons of reduction of the decree of forfeiture, in which his main grounds of reduction were,

1. That having, during the dependence of the process, been not merely ignorant of the fact as to how the law of England stood upon the subject, but misinformed as to that fact by a person in whose information he had reason to place confidence, he was entitled to reduce the decreet as erroneous, and that he could not competently be met with the plea of res judicata; and,

2. That the proceedings were irregular, seeing that the husband of Mrs. Frances had not concurred in the action, and that the trustees of General M'Allister had been sisted in place of her trustees.

To this it was answered,

1. That the decree which was pronounced had been obtained by Colonel M'Allister himself in foro contentioso, and therefore formed res judicata between the parties.

2. That he could not pretend ignorance of what he now averred to be the fact, that the law of England was in his favour,—because he rested upon that in defence, and obtained an order for leading evidence of that fact by the opinion of counsel; and that if he was misinformed, and acted upon that erroneous information, he could not on that account deprive the defenders of the right vested in them by the decree of the Court:—that besides, as matter of law depended upon the opinions of men, and these opinions might vary at different periods, it would be attended with dangerous consequences to allow decrees to be opened up, on the allegation that a new and different opinion had been got; and,

3. That the objections, in point of form, were defences either proponed and repelled, or competent and omitted.

The Court, on the report of the Lord Ordinary, repelled the reasons of reduction, and assoilzied the defender.

Lord Balgray.—I think the question in this case is certainly one of Scots law, whether or not what passed before in the action of declarator was such as to constitute a decree in foro,—in other words, on the point, whether, by the English law, Colonel Matthew M'Allister's taking up the lands was sufficient to bar him from the legacies? whether what took place here was enough to constitute a decree in foro? Looking at the practice in this Court, it was. The Court may have proceeded in error; but it was his duty to have informed himself of the fact as to the law of England on the subject; and if he had it in his power to get correct information of it, I am afraid he cannot now be allowed to open up the former decree. He ought to have informed himself then. If effect were to be given to this plea, every decree in foro might be opened up, on a party saying I have

now got the opinion of gentlemen high at the Bar in my favour; if I had gone to them before, they would have informed me so and so was the case; whereas the gentleman I went to said otherwise, and I framed my conduct accordingly.

Your Lordships may recollect a question that occurred as to a second action in a case from Berwickshire as to reduction of a will.* A party came forward and said, that at the time of the former action he was informed so and so, but that the statement should have been different. He came then forward on the plea of res noviter veniens ad notitiam. The answer was, If it was in your power at the time to get at the fact, you must be supposed to have proponed it, and that it was repelled; and if it was competent, you omitted it.

It is precisely the same thing here; and I think the party has foreclosed himself by his own proceedings. It was he himself who insisted for decree, and therefore it was a decree in foro; and he cannot now be allowed to open it up.

LORD GILLIES.—I am of the same opinion. If he was mistaken or misinformed, it was as to a fact of which he ought to have informed himself correctly. If he did not know, he was bound to know the law of England on the subject.

LORD PRESIDENT.—How can the law of England be res noviter veniens ad notitiam? There it is, and there it was. He says he inquired, and was told the law of England was so and so.

LORD CRAIGIE.—I apprehend there is a peculiarity in this case. It was not the law of Scotland that was in question. Here the party was misinformed as to the law of England, and in this way the party was misled; and he has been grossly and egregiously, it seems, misled as to the nature of his rights, viewed according to the law of England; and therefore I am at a loss to see how we can bar this party from his relief.

With great deference, it appears to me a case very peculiar in its nature. I have no objection to your deciding the claim on the merits just now; but I have considerable doubt as to the propriety of barring the party from relief.

Pursuer's Authorities—4. Stair, 1. 44; 4. Mack. 3. 1; 4. Ersk. 3. 3; 4. Bank. 7. 22.

Defenders' Authorities.—Kames' Eluc. Art. 28; Dundas, March 10. 1809, (F.C.)

A. CLASON, W. S.—M. N. M'DONALD, W. S.—Agents.

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* His Lordship did not mention the name of the case.

No. 422. REPRESENTATIVES of ANDREW SOUTAR, Pursuers and Advocators.—*More.*
JOHN SOUTAR, Defender and Respondent.—*Jameson—Ivory.*

Bill of Exchange—Sexennial Prescription—Vitiation—Relief.—A joint acceptor of a bill holding a letter of relief from two co-acceptors, having retired it in part, and received two other bills from them for the amount so paid by him—Held, in an action at his instance, founded both on the letter of relief and these bills,—1.—That his claim was not barred by the sexennial prescription, or the vitiation of one of these bills;—and,—2.—That the presumption that a partial payment, marked generally by the holder of a bill which had been discounted, had been made by the acceptor, may be redargued by a special receipt in favour of the drawer when the bill was finally retired.

June 29. 1827. 2D DIVISION. Ld. Mackenzie. M'K.

THOMAS SOUTAR, tenant in Logie, the defender's brother, having fallen into arrear of rent, the late George Soutar his father, and Andrew Soutar his uncle, granted along with him a bill, dated 16th July 1812, to his landlord for the amount; but at the same time, George and Thomas addressed to Andrew a letter, bearing that they would retire it, as he (Andrew) had no concern in it, and was to sign it to accommodate them. This bill having been protested, letters of horning were raised, on which Andrew was charged to make payment. On this (according to the allegation of the pursuers) Andrew and George paid each £85 in cash, and the remaining £130 was raised by discounting a bill, dated 15th January 1813, drawn by Andrew upon and accepted by George and Thomas. This bill fell due on the 16th of April 1813, on which day Andrew (as the pursuers alleged) paid £65, the holder marking on the bill a general receipt in these terms: —'Received of the within £65 sterling.' Having been subsequently protested by the holder for non-payment of the balance, Andrew paid up the amount, and received the bill and the instrument of protest, there being a receipt on the bill in these terms: —'Received payment from Andrew Soutar as indorsee,' and on the instrument of protest a special receipt for the whole sum, as having been received from Andrew. There being still £85 of the original £300 bill due to Andrew, and £15 of expenses, for which no document was held by him, he took a bill for £100, dated 10th April 1813, being the amount of these two sums, from George and Thomas; and on Thomas's bankruptcy, which occurred shortly afterwards, Andrew ranked for this bill on his estate, and drew a dividend. Previously to this he had obtained letters of horning on the instrument of protest on the £130 bill, on which he gave Thomas a charge, followed by denunciation and letters of caption; but as the protest had been taken subsequently to the partial payment of £65, deduction was necessarily given of

that sum in the charge. George Soutar died in 1814, but the defender (who was his heir and representative) made several partial payments to Andrew at different times, the latest on the 29th of July 1819, being beyond six years from the date of all the bills above mentioned having fallen due. The defender, however, having refused to make any further payments, Andrew, in November 1819, raised an action against him before the Sheriff of Forfar, founded on the two bills of £100 and £130. Thereupon the defender's agent wrote to him, admitting a balance to be due of £56: 8: 3, which would have been exactly the balance due if the partial payment of £65 on the £130 bill was to be credited, not to Andrew the drawer, but to the acceptors, which the defender contended was necessarily the case, from the presumption of law that all payments, where there is no special receipt, must be held to have been made by the debtor in the bill. He afterwards, however, denied all liability, and the Sheriff having assoilzied him, Andrew Soutar brought an advocation, and he also raised a supplementary summons, (carried on by his representatives after his death,) founded not only on the two bills of £100 and £130 retired by him, but on the original bill of £300, and relative letter of relief.

In these conjoined actions it was alleged by the defender, That there was no proof of the pursuer's averments as to the history of the transactions; and in regard to the documents founded on, he pleaded,

1. That the whole three bills were extinguished by the sexennial prescription.

2. That the partial payment of £65 on the £130 bill must be held to have been made by the acceptors, the debtors in the bill, and not by Andrew, who was the drawer, the more especially as in the charge given by Andrew to Thomas deduction was allowed of this sum; and,

3. That the bill for £100 was manifestly vitiated in the date.

To this it was answered,

1. That in so far as the action was founded on the letter of relief, neither the sexennial prescription nor the special objections to the two bills could have any effect, and that on the letter alone there were sufficient grounds for a decerniture against the defender; but besides, that the plea of prescription was barred by the partial payments, one of them subsequent to the lapse of six years, by the agent's letter admitting a balance to be due, though disputing the amount, and by diligence having been done on the £300 and £130 bills, a charge having been given on the one to Andrew Soutar, and on the other to Thomas Soutar, and a

claim having been made on the £100 bill on Thomas's bankrupt estate.

2. That the receipt in full to Andrew on paying up the bill redargued the presumption of law as to the prior partial payment, proving it to have been made by Andrew, and that the circumstance of deduction of the partial payment being allowed in the charge arose from this, that it proceeded on the protest taken by the holder after the partial payment had been made; and,

3. That the vitiation was made at the time to correct an error; but of this there was no proof, except an inference to be drawn from the appearance of the bill.

The Lord Ordinary decerned against the defender, and the Court adhered.

W. WALKER, W. S.—G. HEGGIE, W. S.—Agents.

No. 423. J. FARIE and Others, Suspenders and Pursuers.—*Jardine.*
EXECUTORS of the late JOHN MUIR, Chargers and Defenders.—*Cockburn.*

Road Acts.—An original subscriber to a road not entitled to attach the rents of toll-bars while there was no surplus, after applying them to the purposes provided by the acts of Parliament, and the payment of the interest of money borrowed on the security of the tolls.

June 29. 1827.
2D DIVISION.
Ld. Mackenzie.
F.

THIS was a question as to whether, under certain local road acts, the rent of the Shawfield toll-bar near Glasgow, situated on what had been originally the Cambuslang road from the city of Glasgow, could be attached for payment of the debt due to an original subscriber to the Muirkirk road, declared by the first act of Parliament to be a 'lien and preferable claim' upon the tolls. These two roads had been put under the same trust some years after their formation, but with special provisions as to the application of the proceeds of the Shawfield bar—a certain surplus only going to the Muirkirk road; and a large debt had been contracted under the acts of Parliament on assignations to the tolls, the payment of the interest of which left no funds, after keeping the roads in repair. The Sheriff of Lanarkshire, in a forthcoming by the representatives of John Muir, an original subscriber to the Muirkirk road, had decerned against Farie &c. the road trustees, and had also previously decerned against them qua trustees in an action of constitution of the debt. But they having brought a reduction of the decree of constitution, and a suspension of that in the forthcoming, on the ground that they had no available funds, as the surplus applicable to the Muirkirk

road, after the proceeds of the Shawfield bar had been applied in terms of the statute, was not nearly sufficient to pay the interest of the money borrowed on assignations to the tolls,—the Lord Ordinary suspended the letters in the suspension, and decerned in the reduction.

The Court adhered in the suspension, but recalled as to the reduction, and remitted to hear further as to whether the trustees were entitled to have a reduction of the decree, in respect to their character of trustees on the Cambuslang road, as distinct from that of trustees on the Muirkirk road, on which the debt was originally contracted.

J. BRIDGES, W. S. Agent.

J. ANDERSON, Pursuer.—*Fullerton—G. Bell.*
W. BORTHWICK and Others, Defenders.—*D. of F. Moncreiff—Jameson.*

No. 424.

Foreigner—Executor—Cautioner.—Circumstances under which it was held, that, cautioners for executors confirmed in a Scottish Court, but who resided in England, could not be called on to count and reckon in terms of their bond, till a decree was obtained against the executors.

June 30. 1827.

1st DIVISION. Lord Eldin. H.

THE late James Anderson, who was a native of England, but had resided in Inverness-shire for several years prior to his death, executed a will by which he nominated John Arkle and William Armourer, both native and resident Englishmen, his executors, and bequeathed several legacies in favour of parties who resided in England, among whom was the pursuer Anderson. The executors obtained themselves confirmed before the Commissary of Inverness, and at the same time George Borthwick, merchant in Jedburgh, and Samuel Wood, writer there, granted a bond, whereby they bound and obliged themselves, 'conjunctly and 'severally, our heirs and successors, as cautioners and sureties, 'acted in the Commissary Court Books of Inverness, for John 'Arkle of Bilsmorefoot, and William Armourer of Duns, both 'in the county of Northumberland, England, that the sum of '£200 sterling, contained in the testament dative of umquhile 'James Anderson of Garthmore in the shire of Inverness, where-'in the said John Arkle and William Armourer are only execu-'tors dative decerned and to be confirmed to the said defunct, 'shall be made free and forthcoming to all parties having interest 'therein, as law will; and subject ourselves, and our heirs and 'successors, to the jurisdiction of the Commissaries of Inverness 'in this particular, and appoint their clerk's office as a domicile

'whereat we may be cited to all diets of Court,' &c. No domicile, however, was appointed within Scotland for the executors.

Thereafter, George Borthwick being dead, and represented by William, the pursuer Anderson came to Scotland, and raised an action of count and reckoning in the Court of Session, both against the executors, and the defenders as their cautioners. He, however, did not found any jurisdiction against the executors, but cited them edictally as defenders in the action. In his summons he concluded that these parties 'should be decerned and ordained, by decree of our Lords of Council and Session, to exhibit and produce before our said Lords a full and particular state of accounts of the said executors' intromissions with the funds and effects of the said deceased James Anderson, whereby the true balance due by them to the pursuer may be duly ascertained by our said Lords;' and 'the said John Arkle and William Armourer, as executors aforesaid; and Samuel Wood, and William Borthwick as heir foresaid of the said George Borthwick, to the extent of the sum of £200 sterling, contained in the said bond of caution, &c., but subsidiary always, ought and should be decerned and ordained, by decree foresaid, to make payment to the pursuer of the sum of £600 sterling, or of such other sum as shall appear to be due by the said executors to the pursuer, as the balance of their said intromissions, after deducting the whole of their legal grounds of discharge.'

No appearance was made by the executors; but Borthwick and Wood, the cautioners, appeared and pleaded, That before they could be called on to implement the bond, it was necessary that a decree of constitution should be obtained against the executors; that as these executors were not subject to the jurisdiction of the Courts of Scotland, no decree of constitution could in this action be pronounced against them; and that such being the case, and the cautioners being concluded against only to make forthcoming subsidiarie of what should be found due to the executors, the action was incompetent against them.

To this it was answered,

1. That as the executors had obtained themselves confirmed before a Scottish Court, they had thereby constituted a jurisdiction against themselves, in so far as related to their intromissions and conduct in that character; and therefore it was quite competent to pronounce decree against them in this action; and,

2. That as it had been settled by repeated decisions that where a principal is abroad, it is not necessary to discuss him before proceeding against the cautioners, and as a decree of constitution

was merely one of the steps of discussion, the pursuer was entitled to raise his action forthwith against the cautioners.

The Lord Ordinary sustained the defences, and the Court, after taking time to consider, adhered, 'in respect that the pursuer has obtained no judgment against the executors showing 'that he has an interest or preferable claim to the sum of £200, 'contained in the cautionary obligation in question.'

At the first advising, LORD BALGRAY observed: The great error which has been committed, has been the omission to cause the executors to constitute a domicile in this country. No doubt they are bound to account; but they are foreigners, and how are we to proceed against them? It is plain that we have no jurisdiction over them, and therefore we cannot pronounce decree against them. But if so, then, as the cautioners are entitled, before being called on to make payment, to see a decree against the executors, to which they may get an assignation in relief, and as no such decree has been or can be pronounced by this Court, the action is plainly inept.

LORD GILLIES.—There is considerable nicety in this case. An executor is an officer of Court appointed to execute the will of the deceased, and therefore I doubt whether a jurisdiction is not thereby constituted against him. Put the case of a Scotchman being appointed an administrator in England; would he not be liable to the jurisdiction of the Courts of that country? I apprehend that he would. If, therefore, our decision is to be considered as proceeding on the general ground, I am not prepared to concur in it. But in the particular circumstances of this case, and attending to the nature of the bond, and to the conclusions of the summons, I think that no proceedings can be taken against the cautioners until decree has been pronounced against the executors. The obligation of the cautioners is merely to make forthcoming a specific sum, whereas the conclusion is for an accounting, which can plainly be only done by having the executors as parties to the action; and besides, what title has the pursuer to require implement of the bond, till he establish that there is the sum due which is there mentioned?

After their Lordships had taken time to consider, the LORD PRESIDENT stated, that in this particular case the Court had soon come to be of one opinion.

Pursuer's Authorities.—Doul, Jan. 20. 1693, (2072 and 2077); Montgomery, June 18. 1713, (3586); 1. Bank. 23. 80; Fisher, Dec. 1757, (2110); Drummond, Jan. 14. 1823, (ante, Vol. II. No. 585.)

LOW and RUTHERFORD, W. S.—D. WATSON,—Agents.

No. 425.

R. NICOL.—*D. of F. Moncreiff—More.*
A. CHRISTIE.—*Jameson.*

Competing.

Sequestration—Affidavit.—Held that a creditor claiming on the estate of a partner of a company for a debt due by the company, must value his claim against the other partners, and deduct it, otherwise he is not entitled to vote.

June 30. 1827.
1st DIVISION.
Lord Newton.
D.

THE estate of George Batchelor, one of the partners of the company of Francis and George Batchelor, having been sequestrated, a competition arose between Nicol and Christie for the office of trustee. The fate of the election depended upon the votes of Robert Nicol and George Whitton. Both of these parties claimed upon bills granted by the company of Francis and George Batchelor, and in their affidavits they valued their claim against the company at nothing; but they did not put any value upon the claim which they had against the other partner, Francis Batchelor. It was therefore objected by Christie, That as the company was the primary debtor, and the bankrupt merely a collateral obligant, and as the other partner Francis stood also in that situation, the claimants were bound to have put a value upon their claim against Francis, and to have deducted it in terms of the 24th section of the statute.

To this it was answered, That as the partners were as much primary obligants in relation to a creditor as the company was, it was not necessary to value the claim against Francis, and accordingly in practice this had never been required, and could scarcely ever be done, seeing that it was often impossible to ascertain how many partners there were, and what were their respective interests in the company.

The Lord Ordinary sustained the objection, and preferred Christie; and the Court adhered.

LORD GILLIES.—On the statute I think the interlocutor is right. It is only in the case where the ranking is on the estate of the primary obligant, and who is bound to relieve the other obligants, that it is not necessary to value the claim against the collateral obligants; but here the company is the primary obligant, and George and Francis stand in the situation of collateral obligants, and entitled to relief out of the funds of the company for proper company debts. It is clear, therefore, that in ranking on the estate of George, the claim on that of Francis ought to have been valued.

LORD PRESIDENT.—Suppose that the estate of Francis were able to pay five shillings in the pound, would the creditor not be bound to value and deduct? I apprehend that he would.

Lord Balgray concurred.
Lord Craigie said nothing, but was understood to assent.

Campbell and Mack, W. S.—J. Brown, W. S.—Agents.

H. Rose, Pursuer.—*Jeffrey—Jameson.* No. 426.
Mrs. Isabella M'Leay and D. Horne, W. S. Defenders.—
Sol.-Gen. Hope—Menzies.

Process—Previous Expenses.—Circumstances in which an amendment of a libel was admitted, without subjecting the party in any previous expenses.

June 30. 1827.
2d Division.
Lord Medwyn.

Rose having brought an action of transference of a process depending with the late Kenneth M'Leay against Mrs. M'Leay, his widow, and Donald Horne, writer to the signet, as 'trustees 'and executors appointed by the said Kenneth M'Leay, conform 'to trust-disposition,' &c., they put in a defence in these terms: 'The defenders do not represent the deceased Kenneth M'Leay 'on any of the titles known in law. The defenders have not 'made up any title to the heritable estate of the deceased under 'the trust-disposition and settlement libelled on. The defenders 'have not been confirmed executors under the trust-disposition 'libelled on.' To obviate this defence, Rose offered an amendment of the libel, to the effect of designing the defenders as 'accepting and acting trustees and executors of the said deceased 'Kenneth M'Leay, and as such intromitting with and in the 'management of his estate, and thereby representing him as trustees and executors foresaid.' This amendment having been admitted by the Lord Ordinary, without subjecting Rose to any previous expenses, the defenders reclaimed, and contended that it was imperative on the Lord Ordinary to award previous expenses before admitting an amendment of the libel; but the Court unanimously refused their reclaiming note.

The Lord Ordinary observed in a note:—The Lord Ordinary formerly explained why he thought himself entitled to admit of this amendment without calling upon the pursuer to pay any part of the previous expenses. The action is sought to be transferred against certain persons nominated trustees by a trust-deed specially referred to according to its date and the date of its recording. The defenders do not say they are not trustees; they do not allege they have not accepted the trust, but content themselves with saying they have not made up titles either to the heritable or moveable property, and do not represent the deceased on any of the titles known in law. The Lord Ordinary thinks they were bound, when called as trustees, to go further, and say whether they had accepted and acted as trustees;

and therefore that the amendment which was proposed by the pursuer, in order to obtain an explicit answer on this point, was rendered necessary, not so much by any defect or omission in framing the summons, as in an over nice and critical adherence, on the part of the defenders, to what they conceived was all they were called upon to attend to in their defences.

LORD JUSTICE-CLERK.—It is only where the Lord Ordinary thinks the summons so defective as to induce him to order an amendment, that he is obliged to give expenses.

The other Judges concurred.

D. CLEGHORN, W. S.—J. GORDON, W. S.—Agents.

No. 427. Sir NEIL MENZIES and Others, Suspenders.—*Sol.-Gen. Hope—Buchanan.*

A. DUFF and Others, Respondents.—*Skene—Duff.*

Road Acts—Interdict.—Interdict granted against road trustees quarrying stones, pending a discussion as to their right to do so under certain local statutes of which they had the benefit, notwithstanding the provisions of the general road act; and Observed as to that statute, that its effect is to ride over all turnpike statutes which are to be read as if it were engrossed in them.

June 30. 1827.

2D DIVISION. Bill-Chamber. Lord Newton. F.

THE respondents, trustees of the Edinburgh middle district of roads, having commenced to quarry stones in grounds forming part of the property of the late Baron Norton, Sir Neil Menzies and others, his trustees, presented a bill of interdict, on the ground that the place where the stones were attempted to be quarried fell within the exemptions of the general road act, (4. Geo. IV. c. 49,) and that the provisions of that statute as to intimation, &c. had not been complied with. In answer to this it was pleaded, That under the local turnpike statutes for the county of Edinburgh, (the powers in which had been extended by statute to the roads of the middle district,) the trustees were clearly entitled to quarry stones from the grounds in dispute, and that they had complied with the provisions of these statutes as to intimation, &c.; and they maintained, that though the powers contained in the local statutes had been extended to the roads of the middle district, still these roads were not turnpike, and could not therefore be affected by the provisions of the general road act, which was limited in express terms to turnpike roads, although these local acts, in so far as their own proper turnpike roads were concerned, might be modified by the general act; and besides, that this act did not supersede more extensive powers contained in previous acts, and would not, even although it were to apply to the middle

district roads, prevent the trustees taking materials from the place in question.

The cause having been remitted to be discussed on the bill, the Lord Ordinary remitted it ob contingentiam to a declarator pending before another Lord Ordinary, and concluding to have it declared that the trustees had no right to quarry in the ground in question; and his Lordship at the same time recalled an interdict which had been previously granted. Against this interlocutor, so far as it recalled the interdict, Sir Neil Menzies &c. gave in a reclaiming note, on advising which, the Court unanimously altered, and continued the interdict.

The Court, without determining the merits of the question, were satisfied that, as the interdict was in fact the whole question at issue, the right of the trustees to quarry stones under the older turnpike statutes, unfettered by the provisions of the general road act, was at all events not so clear as to warrant their being allowed to work pending the discussion; and in reference to the effect of the general road act it was observed, that it must be considered to ride over every turnpike act, and that every such act must be read as if the general act were engrossed in it.

A. PEARSON, W. S.—H. WATSON, W. S.—Agents.

J. GUILD, Suspender.—*Neaves.*
W. LEITCH, Charger.—*Clephane.*

No. 428.

June 30. 1827.
2D DIVISION.
Bill-Chamber.
Lord Newton.
M'K.

Process—Expenses.—Guild presented a bill of suspension of a charge for payment of the dues of extracting a decree for expenses in an Inferior Court, and offered to instruct, by the oath of the charger, (the law agent who had conducted the process, and in whose name decree had gone out,) that the parties had agreed to pay the expenses without extracting whenever they were audited; and that the charger had extracted without previous intimation, and without having the account audited, within five days of the date of the decree, in which, in the Inferior Courts, a blank is always left for filling in the expenses when audited. The Lord Ordinary and the Court refused the bill, chiefly on the ground that the suspender should have objected to the extract going out in the Inferior Court within the time allowed for that purpose.

J. GENTLE, W. S.—J. PEDIE, W. S.—Agents.

No. 429. Mrs. Ann Henderson or Mercer, Raiser.—*Sandford.*
Admiralty Clerks, Compearers.—*Sol.-Gen. Hope—Neaves.*

Jurisdiction—Process—Multiplepoinding.—Part of the cargo of a vessel having been sold by warrant of the Judge Admiral, pending the discussion of a process for condemnation as a prize, and the proceeds lodged in a bank on a promissory note deposited with the Clerk of Court; and the Judge Admiral having found that the cargo was not liable to condemnation, and that it must be restored to a certain foreign house or their attornies; but no claim having been made for many years, and a summons of multiplepoinding having been raised in the Court of Session in name of the bankers, by a party pretending right to the fund, in which there was a conclusion that the Admiralty Clerks should be ordained to produce the promissory note, but which summons was not executed against them—Held,—1.—That it ought to have been so executed.—2.—That it was an incompetent process in the Court of Session;—and,—3.—That the Admiralty Clerks were entitled to object to the competency.

June 30. 1827.
2d Division.
Lord Medwyn.
F.

In the year 1799 proceedings were instituted in the Court of Admiralty by a naval officer commanding one of his Majesty's cutters, for having a vessel called the Stettin, which had been captured by him, adjudged, with the cargo, to be a legal prize. The cargo was claimed as shipped by neutral merchants of Hamburgh, and the greater part of it was allowed to be delivered up to the merchants to whom it had been consigned in this country, on their finding caution to repeat should it be condemned. A quantity of hides, however, not having been claimed by any consignees in this country, a petition was presented to the Judge Admiral in name of A. Henderson and Sons, merchants in Leith, agents for the ship and owners, praying for warrant to sell the hides, in respect of the perishable nature of the commodity, the price to be deposited in a bank for behoof of all concerned, till the determination of the process of condemnation. Warrant having been granted in these terms, the hides were accordingly sold, and the price, deducting freight and charges, paid in to the bank of Sir William Forbes and Company on a receipt, which was deposited in the hands of the Clerk of the Admiralty Court, and was in these terms:—'On demand we promise to pay to the order of Messrs. A. Henderson and Sons, being free proceeds of hides sold under warrant of the High Court of Admiralty, Scotland, £221: 1: 4 sterling, value received.' The Court of Admiralty ultimately found that the cargo was not liable to condemnation, and that the price belonged to the Hamburgh merchants, and was upliftable by them or their lawful attornies, and the judgment was affirmed in the Court of Session.* No claim, however, hav-

* See O'Neil, Nov. 19. 1805, (Ap. Prize, 2.)

ing been made for the proceeds of the hides, an advertisement was, by order of the Judge Admiral, inserted in the newspapers in 1826, intimating that the promissory note above mentioned was still lying in the Clerk's hands, in order that parties having right thereto might bring forward their claims. In consequence of this, Mrs. Mercer, the daughter of the late Mr. Henderson, partner of Henderson and Sons, instead of making a claim in the Court of Admiralty, raised a summons of multiplepoinding in the Court of Session in name of Sir William Forbes and Company, in which there was a conclusion that the Clerk of the Admiralty should be ordained to produce the receipt, that the right thereto might be determined. The summons was not executed against the Admiralty Clerk, but on an order being pronounced and intimated, ordaining him to produce the receipt, appearance was made by the Principal and Depute Clerk, who, after having been reponed against this order, gave in objections to the multiplepoinding on the grounds,

1. That the summons had not been served on them, though containing conclusions against them.

2. That Mrs. Mercer had no title to raise the action, seeing that Henderson and Sons, in whose right she claimed, had acted merely as agents for the owners, and did not pretend any right to the hides, the proceeds of which formed the alleged fund in medio; and,

3. That it was incompetent to bring a multiplepoinding in the Court of Session as to a fund in manibus of another Civil Court, more especially when the right to that fund necessarily depended on maritime questions not competent to the Court of Session in the first instance.

Besides attempting to combat these pleas, Mrs. Mercer contended, That the only interest which the Clerks could have was to be exonered, and as that could be done equally in the Court of Session as in the Admiralty Court, they were not entitled to object to the competency of the process.

The Lord Ordinary stated as his opinion, ' That an application ' to the Admiralty Court would have been the more regular form ' of disposing of the question to whom the contents of the pro- ' missory note belonged, if the circumstances of the case had been ' either known to the parties, or if information could have been ' got from the Admiralty Clerks; yet as, at the distance of 27 ' years, and owing to the death of the parties who knew the cir- ' cumstances under which the deposit had been made, no distinct ' information could be got, it does not appear to have been an in- ' competent or inexpedient proceeding to raise a process of mul-

'tiplepoinding in this Court in the name of the holders of the 'fund,' and repelled the objections to its competency; but on a reclaiming note by the Admiralty Clerks, the Court unanimously altered, and dismissed the process.

LORD ALLOWAY.—This Court can have no jurisdiction in the first instance in a matter purely maritime, which this is. The consignment here, notwithstanding the form of the note, is truly in the hands of the Admiralty Court, and we cannot take away the fund from that Court, and decide who has right to it. If we entertained such an action as this, the Magistrates of Edinburgh, or any other Court in the kingdom, might do the same thing.

LORD GLENLEE.—There are no termini habiles for any competition. In a formal decree of the Court of Admiralty, it has been found that a foreign house is entitled to this money, and it cannot be paid out to the representatives of that house, and execution of the decree can only be asked from the Court of Admiralty itself. Even holding it to be merely a mercantile question, there is an error in form, as the summons was not executed against the Clerks. It is plain the interlocutor must be altered, and the process dismissed.

LORD JUSTICE-CLERK.—It is clear that we cannot interfere, and that the matter belongs to the Court of Admiralty, and must be settled there. In the case of money consigned in the hands of the Justiciary Court, the right to it must no doubt be determined by a Civil Court; and in such a case, a multiplepoinding might be brought here, but it cannot be done where the money is in the hands of another Civil Court, and this woman has no title whatever.

A. DUNCAN, S. S. C.—J. BURNESS, S. S. C.—Agents.

No. 430.

Colonel CAMERON, Pursuer.—*Forsyth—Skene.*

CAMPBELL'S TRUSTEES, Defenders.—*D. of F. Moncreiff—Jameson.*

July 3. 1827.

1ST DIVISION. Lord Eldin. S.

THIS was a case of a special nature. The Lord Ordinary assoilzied the defenders in hoc statu, and the Court adhered.

T. BAILLIE,—HUNTER, CAMPBELL, and CATHCART, W. S.—Agents.

J. MOFFAT, Pursuer.—*Sol.-Gen. Hope—M'Neill.*
J. ALSTON and Others, Defenders.—*D. of F. Moncreiff—Jameson—Pyper.*

No. 431.

SPECIAL case. The Lord Ordinary assoilzied, and the Court adhered, under a qualification.

July 3. 1827.

2D DIVISION. Lord Medwyn. M'K.

TOD and WRIGHT, W. S. — JAMES LANG, W. S. — CAMPBELL and MACDOWALL,—Agents.

G. PENTLAND, Petitioner.—*D. of F. Moncreiff—Buchanan.*
D. PATERSON, his Trustee, Respondent.—*Sol.-Gen. Hope—Fullerton—Paterson.*

No. 432.

Sequestration.—The creditors of a bankrupt under sequestration having resolved that his estate should be exposed to sale; and this having become final, and the trustee having advertised a sale, and the bankrupt having presented a petition praying to prohibit it—Held,—1.—That it was competent to order the petition to be answered, although the sale was thereby suspended; but,—2.—That on the merits it ought to be refused.

PATERSON, trustee on the sequestrated estate of Pentland, coach-maker in Perth, having, pursuant to a resolution of the creditors, advertised for sale by public roup the coach-work and the rest of the heritable property belonging to the bankrupt, on the 18th of June, which was not complained of, the bankrupt on the 14th presented a petition to the Court of Session, stating that his debts were only £6149;—that the debts due to him amounted to £83,000, and his available property to £31,000;—that he had only the night before seen the upset prices proposed by the trustee, which were greatly beneath the true value;—that several of his friends had offered to advance him money on security of his property, sufficient to pay his debts in full;—and that he was willing immediately to find caution to that effect, and praying that, in these circumstances, the trustee might be prohibited from proceeding with the sale, as being ruinous to the bankrupt, without producing any material benefit to the creditors. This petition was opposed at the Bar by the trustee, who contended, That it was incompetent for the Court to stop a sale directed by a resolution of creditors, which had not been complained of in the ordinary form; but the Court, by a majority, ordered it to be seen, and allowed eight days for giving in answers, thereby necessarily suspending the sale.

July 3. 1827.

2D DIVISION. M'K.

Answers were accordingly given in by the trustee, in which he stated, that, from the date of the sequestration in July 1826,

frequent delays had been granted to the bankrupt in the disposal of the estate, to enable him to bring forward an offer of settlement;—that the resolution authorizing the sale was qualified by a condition that it should be suspended if the bankrupt made an offer of security within six weeks;—that the debts in all amounted to upwards of £12,000;—that the £88,000 of debts said to be owing to the bankrupt consisted of claims either utterly hopeless from the situation of the debtors, or incapable of being rendered presently available, or such as, from their character, could not be recovered in a Court of Law;—that the bankrupt's estimation of his property was greatly too high;—that none of it could at present be rendered effectual except that advertised for sale;—and that the upset prices had been fixed on fair calculations made by respectable and skilful persons. In these circumstances, and the bankrupt not being prepared with any security for payment of the debts, though offering to do so if the sale were delayed, the Court unanimously refused the petition.

LORD JUSTICE-CLERK.—What the Court would have done if a regular bond of caution had been offered, I need not say, as that is not the case before us. I do not regret the delay occasioned by ordering answers, as it was necessary to ascertain how the facts stood. But, as matters presently stand, I can see no ground for interfering with a sale, in pursuance of a resolution of creditors not complained of.

LORD GLENLEE.—The assertions in the petition were so strong, that I expected an offer of caution would have been tendered to the trustee before the petition came out for advising. But this has not been done, and I therefore think that it is not within the power of the Court to interfere on such loose allegations as are now made. But if he still offers caution before the sale, the trustee will pay that attention to it which the resolution of creditors implies he is to do.

LORD PITMILLY concurred.

LORD ALLOWAY.—I conceive the Court have no power to interfere in a matter of this description, unless something flagrant and illegal be pointed out.

A. C. HOWDEN, W. S.—R. ROY, W. S.—Agents.

C. RUSSELL, Pursuer.—*D. of F. Moncreiff—Keay.* No. 433.
EARL of BREADALBANE, Defender.—*Jardine.*

Assignation—Partnership.—Circumstances under which it was held that an assignation of the share of a lease, forming part of the stock of a partnership, by one partner to another, does not require formal intimation to complete it, in order to make it effectual against the creditors of the cedent.

July 3. 1827.

2D DIVISION. Remitted from H. of L. M'K.

THE judgment of the Court in this case mentioned ante, Vol. II. No. 62, (which see,) having been appealed to the House of Lords, that House ordered the cause to be remitted to the Court of Session, 'to review generally the interlocutors complained 'of in the said appeal,' with directions 'especially to consider how 'and to whom intimation of the assignation ought to have been 'given,' and to require the opinion of the other Judges. When the judgment came to be applied, Cases were ordered for the whole Court, and in these, besides arguing the general question regarding the completion of the assignation of the lease, the defender founded in a great measure on the specialty of his being a partner of the concern, of which the lease in question formed part of the stock, so that the transference was that of a share of the partnership by one partner to another, and not properly the assignation of a lease. The consulted Judges, considering that this superseded the necessity of determining the question specially pointed out in the judgment of the House of Lords, returned the following unanimous opinion, which sufficiently states the circumstances of the case:—'In consequence of the investigations which 'have taken place, and the productions which have been made in 'this case, since it returned from the House of Lords, we think 'that the question as to the mode of completing an assigna-'tion of a lease does not arise in it. For it appears that the 'predecessors of the parties in this case, along with other persons, 'entered into a copartnery, (13th March 1745,) under the name 'of 'The Marble and Slate Company of Nether Lorn.'

'On the 23d May 1748, Lord Glenorchy granted two leases 'of certain subjects to the partners nominatim, 'who, by con-"tract bearing date 13th March 1745, have all entered into co-"partnery, under the name and title of the Marble and Slate "Company of Nether Lorn.' Two of these partners, Colin 'Campbell of Carwhin, and John Campbell, cashier of the Royal 'Bank, having acquired the shares of the other members of the 'company, thus became the only partners; and it appears that 'the two leases, which would expire in 1801, were, by a deed 'dated 6th March 1771, prorogated by the landlord to them

'equally, their heirs and assignees, for the space of two nineteen 'years. By an agreement, dated 23d March 1771, on the nar- 'rative of the prorogation of the two tacks, and evidently as a 'part of the same transaction, the two parties, Carwhin and John 'Campbell, prorogated and prolonged the contract of copartnery 'for the like term of two nineteen years, 'to quadrate and agree "with the said prorogation.' Lord Breadalbane, the son of 'Carwhin, and Mr. John Campbell, the son of the other partner, 'were, in 1813, the only partners of the company possessing 'under the prorogated tacks, and the interest of each partner in 'it was merely the share of the profits he was entitled to draw as 'a partner.

'On the 23d June 1813, Mr. Campbell accordingly granted 'an assignation of his 'interest or share in the stock and effects "of the Marble and Slate Company of Nether Lorn,' *in* favour 'of Lord Breadalbane, assigning his interest or share from and 'after Martinmas 1812, in security of certain sums advanced to 'Mr. Campbell. Lord Breadalbane did not immediately act on 'this assignation. But he states that, on 2d June 1818, he gave 'notice, by a letter of that date, to Mr. Campbell's son, that he 'was now to avail himself of the assignation; and he desired the 'money received in payment of the bills drawn for sales at the 'quarry to be paid into the Royal Bank in his name for the 'quarry, instead of being received by Mr. Campbell as formerly. 'Mr. Campbell junior acknowledged the receipt of this letter on 'the 6th of June.

'Lord Breadalbane's letter is not produced; and the creditors 'do not admit that the above was the import of it, though there 'seems to be strong presumptive evidence of it, both from the 'terms of the answer of the 6th of June, and because immediately 'afterwards Mr. Campbell did give notice to the manager at the 'quarry that the mode of drawing the bills was to be changed; 'and a new account was also immediately opened with the Royal 'Bank, in the name of the Earl of Breadalbane, for the Easdale 'Slate Company; so that, either by the letter of the 2d June, 'or by some other communication, verbal or written, it is plain 'that notice was given to the above effect, and that a correspond- 'ing change of possession took place, which gave full effect to 'the assignation 1813. Therefore we hold this to be all that 'was necessary to secure to one of the partners the share of the 'stock belonging to the other partner, which he had previously 'assigned to him; being of opinion that the legal form of intima- 'tion is not necessary to complete an assignation, whereby one of 'two partners assigns his share in the company-stock to the other:

'The notice here given was necessary only because the assignation had not been operated upon at first, which made it necessary to intimate that the right under it was for the future to be made available; and for this purpose such notice was sufficient.

'But in this case, the transfer is still further unchallengeable, as the notice was followed up by Lord Breadalbane obtaining possession of all bills after that period made payable to the company, as well as the proceeds of such as were then in the circle, as is established by the letter and memorandum of 29th June 1818. The notice of 2d June 1818, and the possession following upon it, were prior to the sixty days preceding Mr. Campbell's bankruptcy, which took place only on 21st August 1818; and therefore we consider Lord Breadalbane's right to Mr. Campbell's interest or share of the stock of the company, subsequent to the above notice, unchallengeable at the instance of the other creditors who have no title, either by diligence or otherwise, to compete with this assignation.'

The Court accordingly, in conformity with this opinion, repelled the reasons of reduction, and assoilzied; refusing at the same time a motion made by the defender for a diligence to recover the letter said to have been written by Lord Breadalbane, and founded on in the above opinion.

Lord Justice-Clerk.—Judgment must of course be pronounced in conformity to the opinion of the consulted Judges; but I am not prepared to assent to all the propositions contained in that opinion. I have the greatest repugnance to the transference of the share of a partner kept concealed from the world, the partner being allowed to go on with the management. Suppose the company had been involved in ruin, could this man have been relieved of his liability by what has taken place? In such a case, the Court would be obliged to determine whether something more was not necessary to transfer than a simple assignation. Then as to the supposed change of possession, it rests on a very narrow basis. It may have been a very convenient arrangement, but I can see no change of possession, or such a transference, as in my opinion the law requires.

Lord Glenlee.—I acquiesce so far in the opinion as to think that there are here no termini habiles for determining the question, whether intimation is necessary to complete an assignation to a lease. There are two reasons for intimation in transference of this description,—one to put the party in malâ fide, which does not occur here, and the other to the manager, which is an act of possession of the right, and the only one which in many circum-

stances can be had. Now, I cannot conceive a right that does not require either actual possession or intimation; and the question here is, Whether there was such actual possession as to vest the right? There was no doubt a possession, but I have a difficulty in ascribing it to the right. If I bring a quantity of grain into a cellar, and intimate to the keeper of the cellar that he is to hold it for me, that puts him in malâ fide to give it to another, and it is an act of possession. But if he sends me some bolls of it, that is no act of possession, and does not complete the transference. In the same way here, though the bills going into Lord Breadalbane's possession were transferred, that did not necessarily transfer the right. On the whole, I have a certain degree of difficulty in concurring with the opinion.

Lord Pitmilly.—If this case comes to be quoted as a precedent, I can hold it to decide nothing but what is stated in the first sentence of the opinion; and I still think that in a question with creditors, a transference of a lease, retenta possessione, is not good.

Lord Alloway.—I concur with the consulted Judges. There is no person to whom the assignation could have been intimated; there were only two proprietors, and there is no instance of an intimation to servants in order to transfer property.

V. Hathorn, W. S.—H. Davidson, W. S.—Agents.

No. 434. Magistrates of Kirkaldy, Petitioners.—*Lumsden.*

Prison.—Held incompetent to remit to the Lord Ordinary on the Bills during vacation to declare a prison in the course of erecting legal.

July 5. 1827.

1st Division. D.

The Magistrates of Kirkaldy presented a petition, stating that they were in the course of erecting a new jail, which would be complete and ready to receive prisoners within a month—that the old jail had been pulled down—and that it was of great importance that they should be allowed to have the use of the new one so soon as it was ready; but, as the Court would not be sitting, they prayed for a remit to the Lord Ordinary on the Bills to remit to proper persons to examine and report during vacation, and thereafter to declare it a legal prison. The Court, however, considering that they had no power to make such a remit, refused it; but remitted to the Sheriff to examine and report by the first sederunt day in the winter session.

J. Stuart, S. S. C. Agent.

W. KILPATRICK, Petitioner.—*Pyper.* No. 435.
D. WIGHTON.—*Jameson—Reddie.*
M'KENZIE, Respondent.—*A. M'Neill.*

Bankrupt—Sequestration.—An offer of composition refused as not reasonable. Question raised, whether the claim of a creditor made on the estate of a bankrupt, after a petition for approval of a composition, can be taken into calculation in ascertaining whether the bankrupt has the requisite concurrence.

July 5. 1827.

1ST DIVISION.
Lord Newton.
H.

THE estate of Kilpatrick having been sequestrated under the Bankrupt Act, he offered a composition of sixpence in the pound; and this having been agreed to by the creditors then ranked, he presented a petition for approval on the 20th of October 1826, accompanied by a report from the trustee that the whole creditors who had ranked had concurred. Wighton thereafter lodged a claim with the trustee, stating that he did so merely with the view of opposing the petition; and accordingly he entered appearance, and alleged that the offer was unreasonable, and that the bankrupt had not now the requisite concurrence.

To this it was answered,

1. That the question as to the concurrence must be decided by the state of the claims at the date of presenting to the Court the petition for approval of the composition, and the report by the trustee; and as he had then the statutory concurrence, he could not be affected by subsequent claims on the estate; and,

2. That the offer which he had made was quite reasonable.

The Lord Ordinary repelled the objection made by Wighton, who thereupon reclaimed to the Court. In the mean while, and after the interlocutor had been pronounced, M'Kenzie, another creditor, claimed on the estate; and when the case came to be advised, he appeared at the bar, and opposed the approval of the composition.

Kilpatrick then objected that M'Kenzie was not entitled to come forward at this stage of the process; but the Court, without pronouncing any express judgment upon that point, altered,—found the composition was not reasonable, and therefore refused the petition.

The LORD PRESIDENT observed, that a creditor might appear at any time before judgment was finally pronounced; but that the composition was plainly not reasonable, and therefore could not be approved of.

LORD CRAIGIE was of the same opinion.

LORD BALGRAY said nothing upon the first point, but concurred as to the composition not being reasonable.

MACMILLAN and GRANT, W.S.—D. SCALES,—Agents.

No. 436.

HARVEY'S TRUSTEES, Petitioners.—*Moir.*
J. LESLIE, Respondent.—*Gordon.*

Proof to lie in retentis.—Warrant to take deposition of witnesses to lie in retentis limited to those who were seventy years of age and upwards, or in infirm health, and commission refused to be granted generally 'to any of his Majesty's Justices of the Peace' of a county.

July 5. 1827.
2D DIVISION.
M'K.

THE trustees of the late Robert Harvey having presented a petition, praying to have the deposition of certain old witnesses taken to lie in retentis pending an action between them and Leslie, and for commission, inter alia, 'to any of his Majesty's Justices 'of the Peace for the county of Aberdeen;' it was objected by Leslie, That one of the witnesses was stated by the petitioners themselves to be only sixty-nine, and that a deposition to lie in retentis was never allowed on the ground of old age, unless the persons proposed to be examined were at least seventy years old; and also, that the commission ought to be confined to the Sheriff or his substitute.

The Court granted commission to the Sheriff or his substitute, to take the depositions of such witnesses as shall be 'proved to 'the satisfaction of the commissioner to be above seventy years 'of age, or subject to such indisposition as to produce a risk of 'their evidence being lost.'

C. GORDON, W.S.—MACKENZIE and INNES, W.S.—Agents.

T. J. FORDYCE, Suspender.—*Ivory—Gibson-Craig.*
T. COCKBURN, Charger.—*Sol.-Gen. Hope—More.*

No. 437.

Trust—Testament.—A party having conveyed his whole property, and, inter alia, an heritable bond, to persons who had been nominated his executors in a will previously executed, or the survivor, in trust for the purposes declared in the will, or to be declared in any future will; and having subsequently executed a second will in the English form, and improbative by the law of Scotland, revoking all former wills and 'testamentary dispositions,' and containing a settlement of all his property, including the heritable bond—Held,—1.—That the trust-deed was not revoked;—and,—2.—That the survivor of the two trustees was entitled under it to take up the heritable bond, and obtain an entry from the superior.

July 5. 1827.

2D DIVISION. Bill-Chamber. Lord Newton. M'K.

THE late George Mowbray of Devonshire street, London, held an heritable security for £2000 over the estate of Ayton belonging to the suspender Fordyce. In 1813 he executed a will in the English form, in which he appointed the charger Cockburn, and Captain Charles Grant, now deceased, his executors. This will was ineffectual to convey heritage, but in 1814 Mr. Mowbray executed a regular trust-deed, whereby he disponed his whole estate, and, inter alia, this heritable debt, to Cockburn and Captain Grant, 'executors named and appointed by me in and by 'my last will and testament, dated 3d August 1813, or to such 'other person or persons as I shall by any future will or deed to 'be made or granted by me, nominate and appoint as executors 'of my last will,' or the acceptor and survivor of them; but in trust always, and under provision that 'they shall pay and apply 'the same to the person or persons named, and for the uses and 'purposes expressed, declared, and appointed by the foresaid will 'made by me, dated the said 3d of August 1813, or to such other 'persons, and for such other uses, ends, and purposes, as shall 'be expressed, declared, and appointed by me in any other tes-'tamentary deed, or other writing under my hand, to be granted 'by me at any time of my life, or even on deathbed.' This deed contained a procuratory of resignation and precept of sasine in favour of Cockburn and Captain Grant, but in trust as above mentioned. In 1825 Mr. Mowbray executed a third deed, which was purely testamentary and incapable of carrying Scotch heritage, whereby he revoked 'all wills and testamentary dispositions 'by me at any time heretofore made,' and declared this to be his 'last will and testament.' By this deed he also appointed Cockburn his executor along with a Mr. Torin, and he devised the £2000 held on heritable security above mentioned to Cockburn himself, empowering him 'to sue for and recover the same.'

Mr. Mowbray having died in 1826, Cockburn, as surviving trustee under the trust-deed of 1814, demanded an entry from

Fordyce, of whom the heritable bond over his estate was held base, to the effect of being entitled to compel payment. Fordyce then presented a bill of suspension as of a threatened charge for an entry on the part of Cockburn, in which he stated that he was willing to give an entry, and pay the debt to Cockburn, if he could do so in safety, but that the latter was not truly in right of the debt, for the following reasons:—

1. That while the will of 1825 was in itself incapable of conveying Scotch heritage, it revoked the trust-deed of 1814, which being a mortis causâ settlement, was clearly comprehended in the term 'testamentary dispositions,' used in the clause of revocation in that deed.

2. That at all events, if the deed 1814 was not to be held as expressly revoked by the will 1825, yet, as that will revoked the previous will of 1813, and the consequent nomination of executors therein contained, the trust necessarily fell also, as the conveyance in it was to Cockburn and Captain Grant as the executors in that will, and that the other nomination as trustees or executors to be named in a subsequent will was inept to effect a conveyance of property, more especially as the will 1825, in which the second nomination of executors was made, was not a probative deed by the law of Scotland; and,

3. That the destination in favour of Cockburn himself, contained in the will 1825, was ineffectual in respect to heritage, the deed not being probative.

To this it was answered,

1. That the object of the deceased in executing the trust-deed was to put his property in such a shape that he could conveniently dispose of it by will, and that there was evidently no intention to revoke any deeds but proper testaments.

2. That though the charger and Captain Grant are in the trust-deed 1814 described to be executors under the will 1813, yet the conveyance being to them nominatim as trustees, was perfectly effectual to carry the property, subject to such appointment as Mr. Mowbray might afterwards make; and,

3. That the competency of such an appointment was settled in the case of Willock *v.* Auchterlonie; but that at any rate, though the appointment in the will 1825 were ineffectual, the charger was still entitled to an entry in virtue of the trust-deed, leaving the purposes to which as trustee he would be bound to apply the debt for future discussion with any parties having interest.

The Lord Ordinary refused the bill, and the Court, after ordering Cases, unanimously adhered.

LORD JUSTICE-CLERK.—I have no difficulty in arriving at the conclusion that the Lord Ordinary is right. The only interest Mr. Fordyce has is to make himself secure in paying the debt, and it does not appear to me that there is in the will 1825 any declaration of purpose on the part of Mr. Mowbray to recall the trust-deed of 1814. That deed was executed for the very purpose of enabling him to affect the heritable debt by a future will, and though he altered the will of 1813, I do not think the revocation of all wills and testamentary dispositions can possibly include deeds relative to heritable property in Scotland. I am therefore of opinion that Mr. Cockburn, as surviving trustee under that deed, is entitled to an entry.

LORD PITMILLY.—I am entirely of the same opinion. The only point is, how the feudal title is to be completed, and that depends on whether the deed 1814 was revoked by the will of 1825, and I am satisfied that it was not.

LORDS GLENLEE and ALLOWAY concurred.

Charger's Authority.—Willock *v.* Auchterlonie, Dec. 14. 1769, (5539.)

GIBSON-CRAIGS and WARDLAW, W. S.—H. COWAN, W. S.—Agents.

H. ANDERSON, Pursuer.—*Sol.-Gen. Hope—W. Bell.*
J. NELSON.—*Jameson—G. Bell.*

No. 438.

July 6. 1827.

1ST DIVISION. Lord Eldin. S.

THIS was a special case relative to the boundaries of a certain property. The Lord Ordinary decerned in favour of Anderson; but the Court altered, and assoilzied.

ANDERSON and WHITEHEAD, W. S.—W. HUNT, W. S.—Agents.

Madame SASSEN, Pursuer.—*Cockburn—Maidment.*
Sir J. CAMPBELL, Defender.—*Jameson—Makgill.*

No. 439.

July 6. 1827.

1ST DIVISION. Ld. Corehouse. S.

THE pursuer having raised an action for aliment of her child, of which the defender was the father, on the allegation that she had been at the expense of supporting and educating it, moved for an interim decree; but the facts being all disputed, the Lord Ordinary refused a decree, and remitted the case to the Jury Court, and the Court adhered.

J. J. FRASER, W. S.—J. G. DAVIDSON, W. S.—Agents.

No. 440.

W. Brodie, Pursuer.—*Brown.*
Margaret Brodie and Others, Defenders.—*Forsyth.*

Homologation—Process—Stat. 6. Geo. IV. c. 120.—1.—Circumstances under which a plea of homologation was repelled.—2.—A party not entitled to found on documents within his own power, and not produced till after the record was closed.

July 6. 1827.
1st Division.
Lord Newton.
S.

On the 22d of January 1808, Robert Brodie of Glengarth executed a disposition and deed of settlement, by which he conveyed his whole property, heritable and moveable, to the pursuer, his eldest son, under burden of payments to his widow, and to the defenders, his younger children; and he nominated certain persons to be tutors and curators of the pursuer, who was then in pupillarity. The granter died two days thereafter of a disease under which he had been labouring for some time. The tutors then proceeded to act, and intromitted with the whole means and effects conveyed by the will.

In 1813, and when the pursuer was about seventeen years of age, the curators brought an action of exoneration against him before the Sheriff of Ayrshire, in which the Sheriff Substitute, on the 7th of May, found that they were entitled to give up their office, reserving the claims against one another. A long litigation then ensued, and on the 5th of September 1817 the Sheriff Depute remitted to the Substitute to adjust the discharge to be given to the curators, and thereafter to give decree of exoneration in terms of the libel. On the 9th of August preceding the pursuer had attained majority; and thereafter a considerable litigation took place. In October 1818 he brought an action of count and reckoning against the curators in the Court of Session, libelling upon the deed of settlement, and concluding that they should be ordained 'to deliver up to the pursuer the whole writs 'and title-deeds relative to the heritable and moveable estate 'which pertained to the pursuer's said deceased father, or to him-'self;' and also that they should exhibit 'an account of charge 'and discharge, stating on one side their intromissions with the 'funds and effects belonging to the pursuer, and their omissions, 'and on the other the debts they can instruct to have paid, and 'the sums they have laid out for the pursuer's behoof.' It did not appear that any proceedings took place on this summons, and in December 1823 he granted a discharge to the curators. About the same time it was alleged that he uplifted a sum of £15 as rent which had been due preceding his father's death.

In 1825 he brought an action of reduction of the deed of settlement on the head of deathbed. This was admitted by the

defenders, but they pleaded homologation, in support of which they founded on the proceedings before the Sheriff—on the discharge—on the summons of accounting—and on the uplifting of the £15.

The Lord Ordinary sustained the defence of homologation, and assoilzied the defenders, and at the same time issued the following opinion:—'The Lord Ordinary, after an attentive examination of the voluminous pleadings in the action of exoneration at the instance of the pursuer's curators, and the other productions in process, is satisfied that the defence of homologation is made out. The action by the curators, no doubt, began while the pursuer was still a minor; but it continued for years, and much litigation followed after 9th August 1817, the date of his majority. The accounting proceeded all along on the footing that the pursuer had, under the settlement, the sole right to both heritable and moveable succession; and, long after his majority, he carried on a keen litigation as to articles in the account with which, except on this footing, he had no concern. Nor does his conduct appear referable to the interest which, as heir subsidiarie liable for his father's debts, he might have had in the moveable succession; for it does not appear that the father left any debts of consequence, or nearly equal to the moveables. The pursuer also proceeded, throughout the whole litigation, as if he had had the sole interest in the accounting; and he ultimately discharged the curators of their whole intromissions. This discharge was, no doubt, in so far compulsory, that it was granted in terms of a judgment of the Sheriff; but it was compulsory only in regard to the allowances of credit for articles which he had disputed. He never hinted, from first to last, that he was to disclaim the settlement and the moveable succession; on the contrary, he assumed all along the right of canvassing the accounts as the person solely interested; and he granted the discharge in this character. Further, there is evidence produced, that, after the termination of the process, the pursuer uplifted a sum of £15 as rent due at the term preceding his father's death, and making a part of the moveable succession, to which he could have had no right but under the settlement which he is attempting to reduce by the present action.'

After the record had been closed on the summons and defences, the pursuer produced certain letters which were in his possession; and, after the judgment of the Lord Ordinary, he produced in the Inner House a second extract of a decree of absolvitor in absence from an action at the instance of the de-

fenders against him,—the first extract of which he alleged had gone amissing. The defenders having objected to these documents being received, the Court sustained the objection; but, on the merits, altered the interlocutor, and decerned in terms of the libel.

LORD BALGRAY.—I do not think that there is sufficient evidence to make out a case of homologation. We cannot take into consideration what was done during the pursuer's minority. The action of accounting was brought recently after he attained majority, and it is impossible to construe that as a conclusive act of homologation.

LORD PRESIDENT.—I rather think that the case should be remitted to the Jury Court; but, as the case stands, there is no effectual homologation.

LORD GILLIES.—There is no satisfactory evidence as to the uplifting of the £15.

LORD CRAIGIE thought that the judgment was right.

J. CRAWFORD, W. S.—J. STUART, S. S. C.—Agents.

No. 441.

T. NICOL, Pursuer.—*A. M'Neill.*
ANDERSON'S TRUSTEES, Defenders.—*Greenshields.*

July 6. 1827.
1st DIVISION.
Lord Newton.
S.

THIS was a question as to the title of the pursuer, which was involved in special circumstances. The Lord Ordinary found he had no title, and the Court adhered.

C. FISHER,—T. JOHNSTONE, S. S. C.—Agents.

Resolution of the Faculty of Advocates as to Signing Papers.

It is proper to make practitioners aware that, on the 6th of July 1827, the Faculty of Advocates "Resolved that in future every counsel shall affix to the back of the draft of each paper drawn by him the title of the paper, and name of the parties and agent, as now in use; and shall mark with his own hand, on the back of each draft, the date of the paper, and under the date shall subscribe his name according to his usual mode of subscription; and every Member of Faculty is in future strictly prohibited from signing for another any paper, incidental or other papers, without having exhibited to him the draft dated and subscribed by the counsel for whom he signs;—and that any contravention of this rule by any Member of the Faculty shall be held a breach of professional propriety, and of the regulations of the Faculty, for which he shall be answerable to the Dean and his Council, and to the Faculty. And further, the Faculty directed that an extract of this minute shall be printed and circulated among all the Members of Faculty, and that copies thereof shall be transmitted to the Society of Writers to the Signet, and to the Society of Solicitors before the Supreme Courts."

M. Rowand, Pursuer.—*Keay—More.*
N. Stevenson, Defender.—*D. of F. Moncreiff—Sol.-Gen. Hope—Greenshields.*

No. 442.

Agent and Client—Reparation.—Law agent found liable for the loss arising from an heritable security not having been effectually completed.

July 6. 1827.
2d Division.
Ld. Cringletie.
B.

After the judgment had been pronounced in the competition mentioned ante, Vol. III. No. 141, (which see,) Rowand raised an action against Stevenson, the agent whom he had employed to prepare the heritable security which had been postponed in that competition, in consequence of the neglect to obtain confirmation, concluding to have him found liable in the amount. In defence Stevenson pleaded, That the great difficulty which the First Division of the Court had experienced in determining the question of the sufficiency of the security, proved that his error was not of such a gross character as should subject him in the damage thereby arising, more especially as it was a communis error among the conveyancers of Glasgow; and he averred that he had warned Rowand of the insufficiency. Being unable, however, to establish this, or to condescend on any sufficiently specific allegations to that effect, the Court, on the report of the Lord Ordinary, decerned in terms of the libel.

Pursuer's Authorities.—Struthers *v.* Lang, Feb. 2. 1826, (ante, Vol. IV. No. 281.) and Cases there cited.

W. Allester,—T. Darling,—Agents.

Mrs. Janet Davie or Laing, Pursuer.—*Shaw Stewart.*
W. Denny, Defender.—*Sol.-Gen. Hope—Boswell.*

No. 443.

Husband and Wife—Fraud.—Circumstances under which a lease by a husband to his nephew and an heir-portioner was set aside, as in fraudem of an unrecorded liferent infeftment granted to his wife intuitu matrimonii.

July 6. 1827.
2d Division.
Ld. Robertson.
M'K.

The late William Laing, intuitu matrimonii with the pursuer, infeft her in the liferent of certain houses and property adjacent to the town of Dumbarton, and the infeftment was recorded in the burgh registers. The parties were married in 1810, but soon after separated, and shortly before his death in 1812, Laing granted to the defender Denny, his nephew, (and who also succeeded to him as an heir-portioner,) a lease of the property in question for 60 years, for a rent of £2 per annum, and an alleged grassum of £100, with an obligation on the landlord to keep the houses in repair. On his death the pursuer brought an action to

have this lease set aside as in fraudem of the liferent granted her by the deceased intuitu matrimonii. This action was met by the defence, That as the subjects were not burgage, her infeftment was not duly recorded, being registered in the burgh books, and not in the register for the district, and consequently that she had no title to pursue; but the Court repelled this objection as in a question with a party representing the granter of the right.* The case then fell asleep; but having been awakened, it was reported on informations to the Court, who again sustained the pursuer's title, and appointed a condescendence by the defender of the facts he offered to prove in support of his lease. The defender admitted that the value of the subjects was at least £12 yearly; but in his condescendence he alleged, inter alia, that the grassum of £100, which the lease acknowledged to have been paid, and the £2 of rent stipulated, made a fair consideration for the lease. On the other hand, the pursuer averred that the grassum had not been paid; but the Court, holding that the facts admitted in the case were sufficient to entitle her to succeed, and that the averments of the defender were not relevant to support his defence, without requiring any proof, unanimously reduced and decerned in terms of the libel.

Lord Justice-Clerk.—Taking the facts, as to which there is no dispute, there are sufficient grounds for deciding this case. The question is, Whether the lease under reduction was a due exercise of administration on the part of Laing, or was in fraudem of his wife's right? It is granted for 60 years, with an obligation on the landlord to keep the houses in repair, and if that is done, it is clear there can be no free rent at all; so that, even supposing the grassum to have been paid, I am clearly of opinion that the husband was not entitled thus to defeat his wife's right, and that there are sufficient grounds for reducing as in fraudem of her provision.

The other Judges concurred.

W. Patrick, W.S.—J. Blair, W.S.—Agents.

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* See Davie v. Denny, June 2. 1814, (F. C.)

D. KIRK, Pursuer.—*Maitland Makgill.*
W. KIRK, Defender.—*Sol.-Gen. Hope—M'Neill.*

No. 444.

Decree in Absence—Reduction—Expenses.—Circumstances in which the Court reduced decrees of constitution and adjudication in absence, without requiring the party to pay the expenses of the decrees.

July 6. 1827.

2D DIVISION. Lord Medwyn. M'K.

WILLIAM KIRK, a blacksmith, having raised a process of constitution against his brother David of an alleged debt of £116, obtained decree in absence, and thereafter brought an adjudication of a small heritable property belonging to David, in which decree in absence was pronounced. On this decree he got a charter of adjudication, on which he was infeft. The summonses in these actions were executed against David personally; but he was during the whole period in jail, and in a state of poverty. On his liberation, he raised a reduction of the decrees of constitution and adjudication, on the ground that the account on which the decrees proceeded was unvouched, and that a voucher which had been produced for the greater part of the sum was vitiated in essentialibus; and he also concluded for an accounting. Against this action William gave in defences on the merits, and in his note of pleas in law he inserted a plea, that David must pay the expenses of the constitution and adjudication before he could be heard in the reduction. The Lord Ordinary disregarded this plea, and 'in respect that the voucher of the first article of the 'account, for which the decreets of constitution and of adjudica-'tion were obtained in absence, is vitiated in the date, so that it 'does not constitute a legal voucher of debt,' reduced in terms of the libel, and appointed David to give in a condescendence of his claims in the accounting. To this interlocutor the Court adhered, reserving to the defender to found in the accounting on the voucher alluded to, and support the same, and to the pursuer all objections thereto.

Defender's Authority.—Smyth, March 9. 1826, (ante, Vol. IV. No. 351.)

W. WALKER, W. S.—J. YOUNG, W. S.—Agents.

No. 445. B. FLEMING, Pursuer.—*D. of F. Moncreiff—Jameson.*
WILSON and M'LELLAN, Defenders.—*Skene—Fletcher.*

Submission—Homologation.—A submission having been entered into without any limitation in point of time, and not containing the usual blank clause applicable to the endurance, and the parties having, after the expiry of a year, gone on pleading and leading proof before the arbiters and oversman—Held, in a reduction of a decreet-arbitral afterwards pronounced,—1.—That the submission did not fall by the lapse of the year;—and,—2.—That at any rate the parties had prorogated it by their conduct.

July 7. 1827.
2D DIVISION.
Lds. Mackenzie and Eldin.
B.

FLEMING, a merchant in Glasgow, and Wilson and M'Lellan, merchants in Greenock, entered into a reference by a joint missive addressed to two gentlemen agreed upon as arbiters, in the following terms:—'Gentlemen,—Some cotton wool which was brought 'down in the ship Science's long-boat from the city of Savannah 'to Five Fathom Hole for shipping on board the said vessel for 'Clyde, having been damaged, as alleged by the captain, in con-'sequence of a thunder squall overtaking her on her way down 'the river, we, the owners of the said ship, and also the proprietors 'of the cotton wool, hereby submit to your decision which party 'ought and should sustain the loss occasioned by the damage on 'the said cotton. You have full power to call for such documents 'and papers as you may think necessary, as also examine such 'persons connected with the business as you may judge proper. 'Should it so happen that you do not agree in opinion, you are 'at liberty to elect an oversman; and your decision is to be final 'and binding on both parties.' This missive was dated 2d September 1818. In November 1819 the arbiters, in consequence of a difference of opinion, nominated an oversman. There had been no prorogation of the submission; but both parties appeared personally and pleaded before the oversman, and in particular, Fleming addressed several holograph letters to him as umpire, asking delay for the examination of a witness; and, after a judgment had been given against him by the oversman, he gave in observations reclaiming against it. To these observations, prepared by his law agent, Fleming himself added a note, in which he prayed the oversman 'to withdraw his late interlocutor, re-'sume the case de novo, and order Wilson and M'Lellan to 'produce their evidence again before the arbiter, that time may 'be given for Mr. Fleming to bring up his witness, Mr. Walker.' The oversman finally, in December 1821, adhered to his former judgment, and a regular decreet-arbitral was extended, of date March 29. 1822. Of this decree Fleming brought a reduction, on the ground, inter alia, that the submission had expired by the

lapse of a year and day without any prorogation. In defence it was pleaded,

1. That submissions only expire by the lapse of a year and day, where there is the usual clause restricting their duration with the day blank; but that where it is indefinite, and does not provide that the decree shall be pronounced 'between and the 'day of next to come,' the submission lasts for forty years; and,

2. That supposing the submission to have expired, Fleming had prorogated by homologation, as he must be held to have known the legal consequence of the submission being indefinite as to duration, and he was in knowledge of the expiry of the year when he committed the acts inferring homologation.

To this it was answered by Fleming,

1. That all submissions fell by lapse of the year and day, unless specially extended beyond that period; and,

2. That no acts of his could infer homologation, unless there was evidence to show that he knew, at the time, that the submission had expired.

Lord Mackenzie assoilzied Wilson and M'Lellan; but Lord Eldin altered his Lordship's interlocutor, and found 'that the 'submission in question contained no power of prorogation, and 'that it expired in a year and day from its date;—that after the 'expiry of year and day the arbiters differed in opinion, and 'thereupon appointed an oversman, who took various steps in the 'submission, as if it had not expired;—that there are no grounds 'to believe that either the arbiters or the parties knew that the 'submission had so expired; and in particular finds no evidence 'whatever that the pursuer knew that he was no longer bound 'by the submission, or consented to homologate the same;' and therefore decerned in the reduction. The Court at first, by a majority, adhered to this interlocutor; but being equally divided on advising a reclaiming petition, they took the opinion of the other Judges, and, agreeably to the opinion of the majority, altered and assoilzied.

By the consulted Judges the following opinions were returned:—

Lords President, Craigie, Balgray, Gillies, Meadowbank, Corehouse, and Newton.—As the letter of reference between these parties is not limited to any determinate time, within which the arbiters or oversman were to give their award, and does not contain the usual blank, as applicable to the duration of the power of the arbiters, we are of opinion that the powers of the arbiters and oversman did not expire at the lapse of a year from the date of the letter of reference, and that the parties were bound by the award, at whatever time pronounced.

Secondly, At any rate, we are of opinion that the conduct of both parties in continuing to plead and lead proof before the arbiters and oversman long after the lapse of a year from the date of the letter of reference, does amount to complete homologation of their proceedings, or rather, to speak more correctly, does amount to a prorogation of the time for pronouncing decreet-arbitral; and, consequently, that neither party can object to the decreet so pronounced.

Lord Mackenzie.—I concur in the above opinion, with this further observation, that even supposing a submission without any express limitation in respect of time, or any blank in the part relating to time, were to be held limited to a year, still this would only be from presumption of the intention of the parties to adopt one year as a usual or reasonable time. Now, I think in this case the circumstances and the conduct of the parties afford sufficient grounds for excluding any such presumption.

Lord Medwyn.—I concur on the first ground, and think it unnecessary to say any thing as to the second ground stated above.

Lord Cringletie.—I concur in the opinion that the reference did not expire with the lapse of a year after its date; and I think that the after conduct of the parties proves that this was their original intention, and this their understanding of the transaction.

Lord Eldin.—I adhere to my opinion expressed in my interlocutor, dated the 11th March 1824.

The Judges of the Second Division were unanimous in holding that the submission fell at the expiry of the year, but were divided in opinion as to the question of homologation, Lords Justice-Clerk and Pitmilly (and also Lord Robertson, who was on the Bench at the first advising,) holding that there could be no homologation inferred from Fleming's conduct, unless it could be made out that he was aware that the submission did expire by the lapse of the year; while Lords Glenlee and Alloway entertained opinions on this point similar to that of the majority of the consulted Judges.

Pursuer's Authorities.—(1.)—Balfour, p. 409; 1. Bank. 23. 2; Sellartownhill, March 1593, (635); Johnstone, July 6. 1610, (637); Mennies, Feb. 1665, (639); Wallace, Feb. 23. 1672, (639); Stark *v.* Thom, Dec. 23. 1820, (not rep.)—2.—3. Ersk. 3. 48; Thomson *v.* Norton, Jan. 28. 1818, (F. C.)

Defenders' Authorities.—(1.)—4. Ersk. 3. 29.—(2.)—Ersk. i. 2. 27. iii. 8. 43-7; Gardner, July 10. 1741, (Elchies, *v.* Arbitration, 5); Telfer, Jan. 21. 1735, (5657); Taylor, Nov. 25. 1800, (Ap. 1. Arbitration, 8,)

Campbell and Macdowall,—Gibson-Craigs and Wardlaw, W.S. Agents.

J. MITCHELL, Advocator.—*Fullerton—Hopkirk.* No. 446.
J. FREW and Others, Respondents.—*Sol.-Gen. Hope—Robertson—P. Dundas.*

Road Act.—Proprietors of a canal not entitled by themselves or others to use the towing-path as a road for carriages or carts conveying passengers who had come by their boats, so as to avoid going along a turnpike road on which they must have paid toll, the Road Act prohibiting the use of any private passage or way whereby the payment of toll might be avoided.

July 7. 1827.

2D DIVISION.
Ld. Cringletie.
F.

BY the act of Parliament for making the Forth and Clyde canal, the proprietors were empowered to form and repair 'towing-paths on the sides thereof, and also to make, erect, or do all 'other matters or things which they shall think necessary and 'convenient for the making, effecting, extending, improving, 'completing, and using the said navigation, in pursuance and 'within the true meaning of this act.' Some time after the canal was completed, the company of proprietors established track-boats on it for the conveyance of passengers between Glasgow and the Forth; but, in consequence of the great number of locks situated at the end where it joins the Forth, the boat stopped at lock No. 16 near Falkirk, and the passengers, with their luggage, were thence conveyed to Grangemouth, where the canal ends, being a distance of about four miles, in coaches and carts, some of which were the property of the Canal Company, and were driven by their servants, while others belonged to private individuals plying by permission of the company. The regular road from lock No. 16 to Grangemouth was in a direction nearly parallel to the canal, till it joined a road called the Kerse road, which had been formed subsequently to the canal, and had a direction at right angles to it. After proceeding along the Kerse road for a short distance, the Grangemouth road again struck off, and proceeded, as before, parallel to the canal, though at some distance from it. On the Kerse road, at that part over which carriages, &c. proceeding from lock No. 16 to Grangemouth were obliged to pass, was situated a toll-bar, at which all passengers between these two points were obliged to pay toll, and there was no other communication, except by the canal and its banks. Instead of taking this road, the passengers by the canal boats were conveyed along the towing-path of the canal, whereby they avoided the turnpike road entirely, except merely crossing it at the point where the Kerse road and the canal intersected each other. These carriages on their way also diverged to Falkirk by another turnpike road, which, however, had no toll-bar between the canal and Falkirk. This practice was long allowed to go on without interruption; but the advocator Mitchell,

who was tacksman of the toll on the Kerse road for 1821–22, conceiving that the proprietors and drivers of these coaches were guilty of an infringement of the act of Parliament for that road, which contained the usual clause prohibiting, under a penalty, riding or driving through any private passage or way whereby the payment of tolls should be avoided, raised an action before the Justices of Peace of Stirlingshire against Frew &c., drivers and individual proprietors of the several coaches and carts which plied between lock No. 16 and Grangemouth, concluding for conviction in the penalties of the statute. This action the Justices dismissed as incompetent at the instance of the tacksman, without concurrence of the treasurer of the trustees; whereupon Mitchell obtained their concurrence to a new action, which, however, from the delay occasioned, could only apply to the penalties during the last six months of his tack, in consequence of a limitation in the statute.

In defence against this action, it was pleaded by the coach-drivers, That the sole object of the coaches was to convey to the end of the canal, passengers brought by the boats, which could not, from the number of locks, go through the canal itself without great delay, and that the coaches were therefore for furthering the navigation within the meaning of the canal statute; and besides, that the coaches did not go 100 yards along the Kerse road, but merely crossed it; and that this road was not one parallel to the canal, but at right angles to it, and could not properly be evaded by coaches going along the canal bank.

To this it was answered, That the carrying of passengers in coaches could never be construed as using the towing-paths for the purposes of navigation; and besides, that the coaches carried passengers to Falkirk, and persons who had not come by the canal boat;—that the direction of the road was of no consequence, as no person could go from lock No. 16 to Grangemouth without paying toll, and using the towing-path enabled Frew &c. to evade the toll; and that the complaint was, not that the parties travelled the road, and paid no toll, but that they illegally avoided the road and toll altogether. The Justices having in this action ultimately assoilzied Frew &c., Mitchell brought an advocation, and he also thereafter advocated the first process ob contingentiam.

In the first process the Lord Ordinary remitted simpliciter; and his interlocutor having been brought under review by a reclaiming note, his Lordship reported the second process on Cases. The Court appointed Frew &c. to put in a minute stating in what relation they stood to the Canal Company, and whether they conveyed other persons than passengers by the canal. A minute

was accordingly lodged, in which it was stated that some were servants of the company, and others individual proprietors of coaches or their drivers; and that the object of the coaches was solely to convey canal passengers, though other persons might sometimes travel in them. The Court thereafter conjoined the two processes, and decerned against Frew &c. in the second action; and in the first altered the Lord Ordinary's interlocutor, and remitted to his Lordship to hear parties on the objection to the title of Mitchell to pursue in his own name.

A. WISHART, W. S.—J. G. HOPKIRK, W. S.—Agents.

H. ROSE and Others, Advocators.—*Skene.* No. 447.
MAGISTRATES of TAIN, Respondents.—*D. of F. Moncreiff—Gordon.*

Jurisdiction—Sheriff—Thirlage.—Held that it is incompetent for a Sheriff, in a process of commutation of thirlage, to entertain a question as to the existence of a right of thirlage over certain lands, where it is not constituted by written title over these lands per expressum, or established by decree of the Supreme Court.

July 7. 1827.
2D DIVISION.
Ld. Mackenzie.

THE Magistrates of Tain, proprietors under a royal charter of the mills of the burgh, with 'the mill lands, multures and 'sequels of the same,' raised before the Sheriff of Ross-shire a process of commutation of thirlage, in which they called, inter alia, Rose and others, proprietors of lands which they alleged to be subject to the thirl. Certain of these lands were denied to be subject to the thirl; and the Sheriff having pronounced an interlocutor allowing a proof of the possession, under which a proof was in part taken, Rose &c. brought an advocation, on the ground that the Magistrates had produced no express written title of thirlage over the lands in question, and no declarator of thirlage by the Supreme Court; and that it was incompetent for the Sheriff to entertain a question of real right. To this it was answered, That the lands in question had been originally held of the Crown by the burgh, and were situated within the liberties; and that the royal charter, therefore, containing a grant of multures, must be presumed to extend over all the lands within the liberties, though not mentioned per expressum.

The Lord Ordinary, 'in respect the respondents have not 'produced an extract of a decree of declarator of this Court, or 'any evidence of such decree,' remitted to the Sheriff to dismiss the action 'in so far as regarded the lands which are denied to 'be thirled;' and the Court unanimously adhered, under a reservation in favour of the respondents to found, in any declarator

they might bring, on the depositions of certain old witnesses which had been taken, by warrant of this Court, to lie in retentis; but their Lordships at the same time refused to insert a similar reservation as to the evidence which had been taken in the Inferior Court prior to the advocation.

HORNE and ROSE, W.S.—A. STORIE, W.S.—Agents.

No. 448.

J. EYRE and Others, Suspenders.—*Skene.*
EARL of MORAY, Charger.—*R. Bruce.*

River—Nuisance.—Circumstances under which it was held that a party was not entitled to introduce the contents of a common sewer into a mill-lead.

July 10. 1827.
1ST DIVISION.
Lord Eldin.
H.

THE Earl of Moray having begun to form a sewer from the buildings in Moray place, Edinburgh, to introduce the sewage water into the mill-lead which supplies Canonmills, Eyre and others, proprietors of lands and houses adjoining to the mill-lead, brought a suspension and interdict, on the ground,

1. That the Earl had no right to the mill-lead, whereas they were proprietors of it, or at least had a vested interest in it;—that the proposed sewer was an encroachment which they were entitled to resist;—and,

2. That it would be a nuisance.

At the same time a suspension was brought by Downie and others against an attempt by the Earl to connect the sewer with the Water of Leith; and in that case the Court, on the 12th of November 1825, found that he was entitled to do so. (See *ante*, Vol. IV. No. 145.)

In the suspension, therefore, by Eyre and others, the Court adhered to an interlocutor of the Lord Ordinary suspending the letters, and granting interdict; and thereafter, on a petition, they superseded judgment till it should be seen whether Downie and others entered an appeal; but it being now intimated that they did not intend to do so, the Court adhered.

J. A. CHEYNE, W.S.—J. WAUCHOPE, W.S.—Agents.

HERITORS of STRATHBLANE, Suspenders.—*Jeffrey—Skene.* No. 449.
Dr. HAMILTON, Charger.—*Sol.-Gen. Hope—Jameson.*

Manse.—Held,—1.—That it is competent for a presbytery to order additions to be built to an old manse, so as to render it suitable for the minister;—and,—2.—That the heritors are bound to be at the expense of making the manse free from damp.

July 10. 1827.

1st DIVISION.
Lord Eldin.
D.

DR. HAMILTON, minister of Strathblane, presented a petition to the Presbytery of Dumbarton, stating that his manse had been erected in 1732—that it was incurably damp—in a state of great disrepair, and most incommodious, there being only two public apartments on the lower, and four bed-rooms in the upper floor, besides kitchen and offices—that the public rooms were extremely small, being only about 15 feet by 14, and the height 7½ feet. The presbytery, after obtaining the report of tradesmen, found 'that the manse is repairable; that though repaired, it will not 'afford sufficient accommodation to the minister; and that as all 'the apartments are small in size, and low in the roof, there is 'required the additional accommodation of two public rooms of 'moderate dimensions;' and therefore they ordained 'that, be-'sides repairs, such an addition shall be made to the manse.'

Several of the heritors brought a suspension of this judgment, on the ground,

1. That the presbytery had no power to decern for additions, as had been found in the case of Dalmeny; and,

2. That the heritors were willing to make the manse dry by means of proper drains, and to put it into a fit state of repair.

To this it was answered,

1. That it had been repeatedly found that it was competent both for the presbytery and the Court to order additions to be made; and,

2. That, from the position of the manse, it was scarcely possible to render it permanently dry; and that although part of it had been rebuilt about 32 years ago, yet the main walls were of such antiquity, and the rooms so small, that it could not be made a commodious manse without considerable additions.

The Lord Ordinary, before answer, remitted to Robert Wright, Dean of Guild of Edinburgh, 'to inspect the manse of Strath-'blane, and report, first, how far the manse is defective in safety, 'comfort, and accommodation for the use of a minister of that 'parish; and, second, whether by any, or if by any, by what re-'parations, alterations, or additions it may be rendered a suffi-'cient manse, and at what expense.'

He reported that the floors and joisting were in a decayed and rotten state; that the roof and walls were good, with the exception of the west gable, which was insecure, and must be rebuilt; that the house was damp, and that, to obviate this, besides drains, it would be necessary to raise the floors of the rooms 2½ feet; that the accommodation was insufficient, and that the expense of making it a proper manse would be nearly as much as that of a new one.

The Lord Ordinary having reported the case, the Court 'repelled the reasons of suspension, recalled the interdict, and 'found the letters orderly proceeded; and further found that the 'heritors are bound to be at the expense of making the manse 'completely dry and free from damp; remitted to the presbytery 'to proceed accordingly,' and found the suspenders liable in expenses.

Lord Balgray.—The heritors must make the manse dry and comfortable; but how this is to be done, it is somewhat difficult to see. I think also that there must be an addition built to the manse, for it is quite insufficient for the accommodation of a clergyman with his family, and for those who must necessarily reside in the house on occasion of dispensing the sacrament. It would certainly be more advisable to build a new manse, because it generally happens that the expense of repairs considerably exceeds the cost of a new one.

Lord President.—I was counsel in the case of Dalmeny, which was altogether different from the present one. The manse was not ten years old, and it did not require any repairs; but the minister thought it was too small for him, and therefore he wished to have an addition. The Court, however, were of opinion that the manse had been too recently erected to warrant any such additions, and therefore they refused to allow them. In the other cases which are noticed in the papers, both additions and repairs were ordered.

Lord Craigie.—I reported the case of Dalmeny, and I think it was laid down as a general rule, that the Court could not, under the statute, authorize additions to be made.

Lord Gillies.—I am perfectly clear that the minister must have a good and sufficient manse; but the question as to the additions is attended with difficulty. I think the minister should at once claim a new manse.

Suspenders' Authorities.—Robertson, July 28. 1788, (8515); Connell on Parishes, 305.

Charger's Authorities.—Connell, 305, 306, 307.

J. and W. Ferrier, W. S.—A. Clason, W. S.—Agents.

MAGISTRATES of GLASGOW, Petitioners.—*Greenshields.* No. 450.
DAWSON and MITCHELL, Respondents.—*Alison.*

Witness—Proof to lie in retentis.—Warrant granted to take the depositions of witnesses, to lie in retentis, who were seventy years old and upwards, in danger of life, or about to leave the country.

THE Magistrates of Glasgow having, in a depending process between them and the respondents, applied for leave to take the deposition of a witness, to lie in retentis, who was 79 years old, the Court granted warrant in favour of both parties for taking the depositions of such witnesses as should be shown by proper certificates to be above 70 years of age, in danger of life, or about to leave the country,—all to lie in retentis.

July 10. 1827.
1st DIVISION.
H.

W. DICKSON, W. S.—P. TENNENT, W. S.—Agents.

R. DUNLOP, Pursuer.—*Buchanan.* No. 451.
D. NICOLSON, Defender.—*Boswell.*

Citation.—Circumstances under which a party was allowed to found on a service copy, to show that the citation was erroneous.

DUNLOP raised an action against Nicolson, who objected that he had not been duly cited. In support of this, he stated that a copy had been served upon him dated the 21st day of April 1827, calling on him to appear on the 21st of June thereafter; that another was served upon him on the 25th of April, citing him for the 24th of June, and that to this copy there was subjoined a postscript, that 'this citation and double preceding is served in 'place of the double and citation served upon you on the 21st 'day of April current, which is departed from, and this service 'is to be held as the real and correct one.' The execution, which was produced, was dated the 25th of April 1827, and stated that Nicolson had been cited to appear on the 24th May thereafter, conform to citation served upon him of the above date, 'and de-'parting from the double and copy of citation served on the 21st 'day of April current, and holding the double and copy citation 'of this date as the correct one.' It was therefore maintained by Nicolson, That as he was cited to appear on the 24th of June, and the execution bore that he was cited to the 24th of May, the citation was irregular.

July 10. 1827.
1st DIVISION.
Lord Eldin.
H.

In answer to this defence Dunlop pleaded, That as no improbation had been brought of the execution, it must bear implicit faith, and could not be contradicted by the copy, the authenticity of which was not admitted.

The Lord Ordinary repelled the defence; but the Court altered, and found that, in the special circumstances of this case, the citation was irregular, and therefore sustained the defence.

The Judges held that this was to be regarded as a case of a special nature, and not to affect the general rule that a formal execution could not be contradicted by the service copy.

R. DUNLOP, W. S.—D. CLYNE, S. S. C.—Agents.

No. 452. T. SCOT, Suspender.—*Skene—Marshall.*
LEITH BANKING COMPANY, Chargers.—*Fullerton—Anderson.*

July 10. 1827.
1st DIVISION.
Bill-Chamber.
Lord Newton.
D.

THIS was a question as to whether the chargers were onerous holders of a bill charged on, or not. No reference of oath being made, nor writ produced to prove that they were not onerous, the Lord Ordinary refused a bill of suspension by Scot, and the Court adhered.

R. W. NIVEN, W. S.—J. BISSET, S. S. C.—Agents.

No. 453. M. M'KENZIE, Suspender.—*Fullerton.*
H. ROSE, Charger.—*Sandford.*

Process.—A charger in the Bill-Chamber having omitted to intimate the lodging of his answers, and an interlocutor prejudicial to the suspender having been pronounced, a remit made to hear the suspender.

July 10. 1827.
1st DIVISION.
Bill-Chamber.
Lord Newton.
D.

M'KENZIE presented a bill of suspension and interdict against Rose, to prevent him fishing in a river to which M'Kenzie alleged he had the exclusive right. Answers having been lodged, but no intimation given, the Lord Ordinary passed the bill, but refused the interdict. M'Kenzie then reclaimed, and contended, That as the lodging of the answers had not been intimated, and he was thereby prevented from being heard before the Lord Ordinary, he was still entitled to be heard. The Court accordingly remitted to the Lord Ordinary to hear parties as to the interdict.

H. MACQUEEN, W. S.—HORNE and ROSE, W. S.—Agents.

G. Rodgers and Others, Pursuers.—*Jeffrey—Penney.* No. 454.
T. Harvie, Defender.—*D. of F. Moncreiff—Skene.*

Road—Prescription.—The use of a road, chiefly for the purposes of recreation, having been enjoyed by the public beyond the memory of man, and antecedent to all interruption—Held that subsequent interruptions, which did not prevent the use and enjoyment of the road, were not sufficient to deprive the public of their right.

July 10. 1827.

2d Division. Jury Court. M'K.

Rodgers and others having brought an action of declarator of their right to a public footpath along the banks of the river Clyde from Glasgow to Carmyle, which had been shut up in spring 1822 by Harvie, proprietor of the lands of Westhorn through which the footpath passed, the following issue was sent to trial before a Jury:—'Whether, for forty years and upwards 'prior to the months of March, April, or May 1822, there existed 'a public footpath or footroad along the right bank of the river 'Clyde from the city of Glasgow, from the place called the Green 'to the village of Carmyle, situated on the said bank of the 'river?' On the trial the pursuers adduced in evidence a series of witnesses, some of them upwards of eighty years old, who deponed, that as far back as they could remember, and down to the interruption in 1822, there was a footpath on the bank of the Clyde the whole way from Glasgow to Carmyle;—that it was open to the public, and constantly used by all classes of people, but chiefly for recreation; and that though there were fences between the different properties through which the road passed, yet there were stiles or openings for passengers going along the footpath. On the other hand, the defender, after giving in evidence the title-deeds of his estate of Westhorn, which described the lands as bounded by the Clyde, and contained no reservation of a right of way by the river side, adduced a number of witnesses to prove that at several periods attempts had been made by different proprietors along the Clyde, and among others by the defender and his authors, to stop the path by erecting fences or cutting ditches, and by turning back individuals who were going along it. The earliest of these attempted interruptions, however, appeared to have been in 1789, and none of them had in any degree the effect of preventing the use of the road by the public, who, by breaking down the fences, kept the communication open, and constantly enjoyed the road till 1822, when the defender effectually stopped their progress by a wall. He further adduced evidence to prove that the distance from Glasgow to Carmyle by the public road was only four miles, while by that in question it was

seven miles. On this evidence the Lord Chief Commissioner, who tried the cause, directed the Jury to find for the pursuers. The Jury accordingly returned a verdict for the pursuers, and the defender, after an unsuccessful attempt to have it set aside as contrary to evidence, tendered a Bill of Exceptions, in support of which he contended,

1. That to establish a right to a public road, it was necessary to prove uninterrupted and peaceable possession on the part of the public, and acquiesced in by the proprietor, for forty years; but that, in the present case, the possession having been continually resisted and disturbed, and not having been acquiesced in by the proprietors, it could not establish a right of road; and consequently that it was not necessary for the pursuer to prove that the interruptions had been acquiesced in by the public, as they had actually acquired no right which it required interruption to deprive them of; and,

2. That a public road must be a communication for carrying on business between two public places, which the road in question was not, being only made use of for recreation, and the distance by it between Glasgow and Carmyle being three miles greater than by the ordinary road.

To this it was answered,

1. That it having been proved that the public had enjoyed an immemorial possession of the road far beyond the period of prescription, antecedent to all interruption, the right must be held in law to have been then in the public; and consequently, in order to deprive them of that right, there must be an effectual and acquiesced in interruption of it for forty years; whereas the interruptions here were neither effectual nor acquiesced in, and were of such a nature that they would not have been sufficient even to prevent the acquisition of a right of way, and far less to deprive the public of it when already acquired by possession beyond the memory of man, antecedent to all interruption; and,

2. That the public might acquire a right to a road for the purposes of health or recreation, but that the road in question was also of use for purposes of business, and formed a communication between intermediate points and roads along the banks of the river from Glasgow to Carmyle.

The Court unanimously disallowed the exception.

Pursuers' Authorities.—Neilson, Jan. 27. 1623, (10880); Bethune c. Ogilvy, 1670, (10912); Nicholson, (11. 291.)

J. C. Wilson, W. S.—Macmillan and Grant, W. S.—Agents.

T. FALCONER and Others, Advocators.—*More.* No. 455.
J. SHEILLS and COMPANY, Respondents.—*Skene—Gillies.*

Process—Advocation—Stat. 6. Geo. IV. c. 120.—Held,—1.—That an advocation under § 40. of the Judicature Act of a cause in which an interlocutor allowing a proof has been pronounced, is incompetent, under the Act of Sederunt following on the Judicature Act, after the lapse of fifteen days from the date of the interlocutor;—and,—2. That it was not ultra vires of the Court to impose this limitation on the power of advocating, though given in the statute without limitation.

July 10. 1827.
2D DIVISION.
Ld. Cringletie.
B.

IN a process at the instance of Sheills and Company, before the Dean of Guild Court of Glasgow, for the purpose of obtaining leave to convert certain premises belonging to them into a calender, and to erect a steam-engine, they were opposed by Falconer and others, neighbouring proprietors, who alleged that the intended alterations would create a nuisance injurious to their properties. On the 2d of March 1826 the Dean of Guild pronounced an interlocutor allowing Falconer and others a proof of their allegations, to be concluded within six weeks. No steps were taken in this proof; but on the 12th of April, the six weeks being almost expired, Falconer and others presented a bill of advocation in terms of the 40th section of the Judicature Act, which provides that, in all questions depending in Inferior Courts of greater value than £40, 'as soon as an order or interlocutor allowing a 'proof has been pronounced,' 'it shall be competent to either 'of the parties who may conceive that the cause ought to be tried 'by Jury, to remove the process into the Court of Session by 'bill of advocation, which shall be passed at once without dis-'cussion, and without caution;' and declares, that 'in case no 'such bill of advocation shall be presented, and the parties shall 'proceed to proof under the interlocutor of the Inferior Court, 'they shall be held to have waived their right of appeal to the 'House of Lords against any judgment which may thereafter be 'pronounced by the Court of Session, in so far as by such judg-'ment the several facts established by the proof shall be found 'and declared.' This bill having been passed, and the letters expede, it was contended by Sheills and Company, That the advocation was incompetent, in respect no bill had been intimated in the Inferior Court within 15 days from the date of the interlocutor allowing a proof, agreeably to the provisions in the Acts of Sederunt passed under authority of the Judicature Statute. The provisions founded on were § 71. of the Act of Sederunt relative to the Court of Session, and § 3. part 1. c. 18. of that regarding Burgh Courts. By the former it is declared, in reference

to advocations under § 40. of the Act of Parliament, 'That if 'neither party shall intimate in the Inferior Court the passing 'of a bill of advocation within 15 free days after the interlocutor 'has been pronounced in the ordinary case, and 30 days in causes 'before the Courts of Orkney and Shetland, the bill and passing 'thereof shall be held to fall, as if it had never been pre-'sented, and the proof may effectually proceed in the Inferior 'Court.' And by the latter it is declared, in reference to the same matter, that 'it shall not be competent for either of the parties to 'take any proof (except one allowed to lie in retentis) until after 'the expiry of 15 free days in the ordinary case, and 30 days 'in cases before the Courts of Orkney and Shetland, in order to 'give time for an advocation in terms of the statute 6th Geo. IV. 'c. 120. § 40; and unless the passing of a bill of advocation shall 'be duly intimated within the said periods of 15 and 30 days re-'spectively, the proof shall proceed; provided always, that by 'agreement of parties, the proof may be taken without any such 'delay.' On these clauses it was contended by Sheills and Company, That an advocation under the 40th section of the Judicature Act was incompetent, unless presented and passed, so that the passing should be intimated within 15 days of the date of the interlocutor allowing a proof; and the case of M'Farlane, (ante, Vol. V. No. 24.) decided by the First Division, was referred to in support of this construction. On the other hand, Falconer and others maintained, That the object of the Acts of Sederunt was to prevent the proof being commenced till the expiry of 15 days, to give time for advocation; but that although the proof might go on if no bill was intimated within the 15 days, yet it did not limit the period for advocating, provided the parties had not commenced leading their proof, which was the only limitation contained in the Act of Parliament; and further, that if the Acts of Sederunt could bear an interpretation such as that put on them by Sheills and Company, they were clearly incompetent, as the Court had no power to limit, in point of time, a right of advocating conferred on the lieges by the statute without such limitation.

The Lord Ordinary, 'in respect of the decision of the First 'Division in the case of M'Farlane *v.* the Duke of Montrose, and 'in respect of § 3. of the Act of Sederunt relative to the Burgh 'Courts,' dismissed the advocation as incompetent. Against this interlocutor Falconer and others reclaimed; and the Second Division, entertaining great doubts of the judgment in the case of M'Farlane, ordered Cases for the opinion of the whole Court. But the consulted Judges having returned an unanimous opinion, 'that 'not only from the terms of the Act of Sederunt 12th November

'1825, but from the particular circumstances of this case, the 'said interlocutor is right, and ought to be adhered to,' the reclaiming note of Falconer and others was refused accordingly.

W. ALLESTER,—J. THORBURN,—Agents.

HEBITORS and KIRK-SESSION of GLASSFORD, Advocators.— *Sir J. Connell.*
R. ORR, Respondent.—*J. Miller.*

No. 456.

Poor—Jurisdiction.—The heritors and kirk-session of a parish not having taken a claim for relief into consideration, or given any deliverance thereon—Held,—1.—That the Sheriff has jurisdiction to ordain them to meet and consider whether the claimant is entitled to aliment, and that he is entitled to allow a proof of the settlement of the pauper, in order to enable him to determine whether he will so order them to meet.—2.—That a meeting pending the discussion before the Sheriff, at which the heritors and kirk-session approved of the conduct of the minister in verbally refusing relief, and resisting the pauper's application to the Sheriff, will not alter the case.—3.—Question raised, but not decided, whether an action by a third party, who had alimented a pauper, against the parish, is competent before the Sheriff.

July 10. 1827.
2D DIVISION.
Ld. Cringletie.
F.

THE respondent Orr, an operative weaver in the parish of Glassford, received into his house to board an infant child of one Torrance, whose wife had deserted him, and who was said to have a settlement in the parish. Shortly after this, Torrance having died, Orr made repeated applications verbally to the minister to have the child taken off his hands. These were either neglected, or, as the minister alleged, verbally refused by him. At last Orr presented a written petition to the heritors and kirk-session; but no deliverance was given on this petition, nor any meeting held to take it into consideration. He then presented a petition to the Sheriff Substitute of the Middle Ward of Lanarkshire, praying him to ordain the heritors and kirk-session to take the child off his hands, and relieve him of its support; and failing their doing so, to find them liable to him in such a sum of aliment as might be deemed reasonable; or, at all events, to ordain them to meet and take the petition formerly presented to them, and the case, into consideration.

In answer to this petition, the heritors and kirk-session, besides alleging that Glassford was not the parish of Torrance's settlement, and that the child had relations who were bound to maintain it, objected that the Sheriff had no jurisdiction in such matters; and, on his pronouncing an interlocutor allowing Orr a proof that the father of the child had a settlement in the parish of Glassford at the time of his death, they gave in a re-

claiming petition on the point of competency. On this petition the Sheriff Substitute pronounced an interlocutor expressly sustaining his jurisdiction; and to this interlocutor the Sheriff Depute adhered. It afterwards appeared, that between the date of the interlocutor of the Sheriff Substitute and that of the Sheriff Depute, a meeting of the heritors and kirk-session had been held, at which the minister stated that he had personally told Orr that he was not entitled to be relieved of the child, and that Orr had since raised an action before the Sheriff; whereupon they 'approved of the conduct of the minister and other managers of the 'poor in resisting Orr's application;' but no intimation of such a meeting having been held was made in the Sheriff Court; and the heritors and kirk-session, on the judgment of adherence by the Sheriff Depute, brought the case into this Court by advocation, and produced an extract of the minutes of the above-mentioned meeting, for the first time, with their reasons of advocation.

In support of their advocation, the heritors and kirk-session contended, That the management of the poor was intrusted solely to the heritors and kirk-session, who were subject to the control of the Supreme Court alone, and that the Sheriff had no power whatever to interfere in any such matters, as had been found in the case of Richmond &c. *v.* the Abbey Parish of Paisley, (ante, Vol. I. No. 212);—and that, even supposing the Sheriff had jurisdiction to ordain the heritors and kirk-session to meet and take the case into consideration, that did not authorize him to enter into an investigation as to the pauper's settlement, which was in no way necessary to enable him to exercise the jurisdiction of ordaining them to meet, and was, by the acts of Parliament regarding the poor, put as completely within the sole jurisdiction of the heritors and kirk-session in the first instance, as the title of paupers to be relieved, or the amount of relief to be given; and, at any rate, that the kirk-session had actually met and refused the claim.

To this it was answered,

1. That the case of Richmond had reference only to the jurisdiction there attempted to be exercised by the Sheriff in reviewing the judgment of the heritors and kirk-session on a claim for relief by a pauper, and expressly reserved the question of the Sheriff's power to ordain heritors and kirk-sessions to meet and take a case into consideration, so that it did not touch the present case, where the heritors and kirk-session had given no deliverance on the petition for relief.

2. That although the Sheriff had no jurisdiction to review the

judgments of the heritors and kirk-session, or to decide on the claim by a pauper himself in the first instance, he undoubtedly had power, by the proclamations and acts of Parliament, to ordain heritors and kirk-sessions to meet, when they refused or neglected so to do.

3. That the Sheriff had also been found, by various decisions, to have jurisdiction to entertain questions like the present, which was not a demand for aliment by a pauper, but a claim by a third party to be relieved of the burden of maintaining a child which he was not bound to support, and so resolved into a question of patrimonial interest, which was equally competent before the Sheriff as an action against a father or a son by a third party who had supported his indigent child or parent, although a direct action for aliment between the parent and child would not be competent.

4. That, supposing the Sheriff could only entertain the case to the effect of ordaining the heritors and kirk-session to meet, still it was necessary to ascertain whether the pauper had a settlement in the parish, in order to determine whether or not he should so ordain them to meet; and,

5. That the question could not be affected by the alleged meeting of the heritors and kirk-session, which was a proceeding pendente lite; and besides, the meeting did not take the petition into consideration, but approved of the conduct of the minister, who had refused to call a meeting to consider it, and had resisted the application to the Sheriff.

The Lord Ordinary, 'in respect that the petition in this case 'to the Sheriff was not at the instance of the pauper himself, but 'at the instance of the respondent, who, it is admitted on all 'hands, was not bound to aliment him, and was brought against 'the parish of Glassford for relief of the burden of maintaining 'the child, and that the jurisdiction of the Sheriff has always 'been sustained in such cases of relief, and was acknowledged by 'the Court in the case of the Abbey Parish of Paisley, and also 'in respect that the Sheriff has jurisdiction to order the kirk-'session to meet to consider whether a pauper is entitled to ali-'ment or not, and consequently may take such steps as will en-'able him to judge whether he should order or not the kirk-'session to meet for that purpose; and in respect that in this in-'stance the Sheriff had done no more than to take such measures 'when the advocation was brought,' remitted simpliciter, with expenses.

The heritors and kirk-session having reclaimed, the Court adhered to his Lordship's interlocutor, 'in so far as it remits the

'cause simpliciter to the Sheriff, 'in respect that the Sheriff has "jurisdiction to order the kirk-session to meet to consider whe-"ther a pauper is entitled to aliment or not,' and finds expenses 'due;' but being equally divided as to the other ground on which the interlocutor was founded, they at the same time recalled, quoad ultra, 'the rationes decidendi of that interlocutor as 'unnecessary.'

LORD PITMILLY.—I doubt the correctness of the interlocutor. The petition to the Sheriff contains two different prayers. The one—to have the heritors and kirk-session ordained to meet—I think was competent; but, as to the other, I conceive he had no jurisdiction; and even as to the first, he has gone further than ordaining the heritors and kirk-session to meet. Besides, they have now dismissed the application made to them by the respondent; and I would therefore propose to find that the petition to the Sheriff was competent, so far as it prayed him to ordain the heritors and kirk-session to meet; but in respect that they have now met and decided the case, I would advocate, and assoilzie them, reserving to the respondent to apply to the Supreme Court.

LORD ALLOWAY.—I agree entirely with Lord Pitmilly. After the meeting of the heritors and kirk-session, the Sheriff should have found the action incompetent. In certain competitions, as between two parishes, it may be necessary for the Sheriff to decide; but this is not one of them.

LORD GLENLEE.—There is no analogy between this case and that of Paisley. All that was decided there was, that the Sheriff had no power of review when the heritors and kirk-session had pronounced a judgment on an application for relief. Here the heritors and kirk-session refused to take the petition into consideration, and they could not alter the state of matters by taking it up, after considerable procedure before the Sheriff. As to the question whether a party claiming relief is in a state of pauperism, and the like, they are all intended to be left to the heritors and kirk-session; but the case is quite different where they do not deny that he must be supported, but say that he has relations, or that there are other parishes bound to support him. In such a case, I think the Sheriff has jurisdiction to entertain the question whether the parish on whom the demand is made is liable to support the pauper, he being entitled to support; but it is scarcely necessary to decide that question here, as it is enough to support the jurisdiction that the heritors and kirk-session neglected to meet; and the Sheriff is entitled to take such steps as will enable him to decide whether he shall ordain them to do so.

LORD JUSTICE-CLERK.—I have no conception that this clergyman stating to a meeting that he had privately disposed of the case, and their approving of his conduct, could make any change on the state of

the process, as they just ratified his proceedings in opposing the application to the Sheriff. On the other point I take the same view with Lord Glenlee, though perhaps it is unnecessary to decide it. If the Sheriff had fixed the rate of aliment to be paid in future, this Court would not have allowed it; but when the demand is for relief of aliment advanced, that is clearly a question of patrimonial right; and I can see no difference between the present case and that of Alyth. As to the Paisley case, it was totally different, and has no reference to this.

After hearing Lords Justice-Clerk and Glenlee, Lords Pitmilly and Alloway concurred in the modified adherence to the Lord Ordinary's interlocutor above mentioned.

Advocators' Authority.—Richmond *v.* Abbey Parish of Paisley, (ante, I. 212.)

Respondent's Authorities.—Dicta of the Court in Richmond *v.* Abbey Parish of Paisley, Nov. 29. 1821, (Dunlop on Poor Laws, No. 5. App.); Procl. July 31. 1694; Mor. Dict. *voce* Poor, Nos. 8, 9, 14, 15, 16, 19, and No. 1. App.

G. Mill, S. S. C.—Scott and Boog, W. S.—Agents.

Murdo M'Kenzie, Advocator.—*Buchanan.*
A. Taylor, Respondent.—*A. Wood.*

No. 457.

Process—Record—6. *Geo. IV. c.* 120.—Reclaiming note dismissed, in respect of the record not being attached to it.

July 10. 1827.

2d Division.
Lord Medwyn.
F.

In an advocation by M'Kenzie of an action against him at the instance of Taylor, the Lord Ordinary having pronounced an interlocutor on a closed record unfavourable to M'Kenzie on an objection to Taylor's title to pursue, he presented a reclaiming note, to which was attached an appendix containing two papers called 'Corrected addition to reasons of advocation,' and 'Corrected answers to the corrected addition,' &c.—but not having the whole closed record. On the case being put out for advising, the Court adverted to the defect of the note in not having the record attached, and delayed for a day or two to consider whether they could competently take up the case at all. In the mean time M'Kenzie printed and boxed a new appendix containing the proceedings in the Inferior Court, and the rest of the record in this Court, and he pleaded that what was originally attached to the reclaiming note was the only part of the record having reference to the title to pursue, which was the sole point decided in the interlocutor submitted to review; but the Court, holding that unless reclaiming notes were presented with the whole record, as prepared and closed, attached in terms of the Act of Parliament, they could not entertain it, dismissed it as incompetent.

H. Macqueen, W. S.—J. Macdonell, W. S.—Agents.

No. 458. J. KER, Advocator.—*Napier.*
J. BAIRD, Respondent.—*Macallan.*

Process—Summons.—A party having brought an action concluding for delivery of a bill bearing to be indorsed by him, but which he alleged he had given to the defender without value for a special purpose; and having thereafter averred that his name was forged, but there being no such allegation in his summons, a proof of it was refused.

July 10. 1827.
2D DIVISION.

KER raised an action before the Sheriff of Peebles against Baird, concluding for delivery of three bills bearing to be indorsed by Ker, but which he alleged he had handed over to Baird without receiving any value, for the purpose of showing them to some person whom he expected to cash them. There was no allegation in the summons that the indorsations were not truly the signatures of Ker; but in the course of the process he alleged that they were forgeries, and offered to prove this allegation by the evidence of persons acquainted with his manner of writing.

The Sheriff having refused to allow this proof, and having found that the allegation of the bills having been given to Baird without value could only be proved by his writ or oath, and having appointed Ker to give in a minute to that effect, if he meant to make a reference, he brought an advocation, in which the Lord Ordinary remitted simpliciter, and the Court adhered.

J. MORISON, S. S. C.—J. DUMBRECK, W. S.—Agents.

No. 459. T. MILLER, Suspender.—*Sol.-Gen. Hope—A. Wood.*
R. WILSON, Charger.—*Whigham.*

Arrestment.—Held that the salary of an extractor of the Court of Session is arrestable.

July 11. 1827.
1ST DIVISION.
Bill-Chamber.
Lord Newton.
D.

WILSON, a creditor of Miller, one of the extractors of the Court of Session, having executed an arrestment of the salary due to him in the hands of the collector of the fee-fund, Miller presented a bill for letters of loosing arrestment, which the Lord Ordinary refused, 'in respect he sees no reason to think that the 'salaries of public officers, such as the complainer's, are not ar-'restable.' Miller then reclaimed, and contended, That it was a general rule, that where a fund was allowed to a public officer for his support in the performance of his public duty, it was not arrestable; that on this principle the salaries of the Supreme Judges could not be arrested; that, besides, the fund was properly

of an alimentary nature, being given not to maintain a certain rank or dignity, but purely for his support.

To this it was answered, That Miller had a salary of £150 per annum, and besides, as extractor, was entitled to 1s. on each sheet, which produced him a further revenue of about £200; that the arrestment only attached a quarter's salary, and that it was equally as much arrestable as the stipend of a minister, or the salary of the keeper of the Parliament, or of a macer, all of which had been found to be arrestable.

The Court unanimously adhered.

LORD PRESIDENT.—According to the principle contended for by the suspender, even his person would be free from arrest, because he would thereby be effectually prevented from executing his office. But that is utterly untenable; and as it has been settled that a minister's stipend may be arrested, there appears to be no ground here for any distinction.

J. MACDONELL, W. S.—J. MACANDREW, S. S. C.—Agents.

MARGARET ANDERSON and Others, Pursuers.—*Skene*—*D. Macfarlane.*
J. BOYD, Defender.—*More.*

No. 460.

Proving the Tenor.—Circumstances in which a proving of the tenor of a deed was allowed to proceed, although there were no adminicles expressive of its precise terms.

July 11. 1827.
1ST DIVISION.
H.

BOYD, as trustee on the sequestrated estate of James Anderson, merchant in Paisley, having brought a reduction, on the act 1621, of a disposition and sasine executed by him in favour of his brothers and sisters, they alleged in defence that the deed had been granted by the bankrupt in implement of a trust-deed of settlement executed by their father in September 1807, which the bankrupt had, along with his mother, destroyed after the death of their father; and that he had granted a letter of obligation, the original of which had been lost, but of which a copy had been preserved, binding himself to grant the disposition in question. The Lord Ordinary (Alloway) having found that it was necessary to prove the tenor of the father's trust-deed, they brought an action for that purpose, both as to the trust-disposition and letter of obligation. In support of this action they stated, that they would prove the execution of the trust-deed, and a relative codicil by the writer, and one of the instrumentary witnesses who was alive;—that both the deed itself and the scroll, with the exception of the part relating to the description of the property, had been delivered to their father;—that when

he was on deathbed, he had given the deed to a confidential person to peruse, who did so, and afterwards delivered it to him;—that on the 4th of April the bankrupt, who was the eldest son, and to whom it was prejudicial, had gone from Paisley to Edinburgh with the deed, and there caused a memorial to be prepared in name of his father, on which he consulted Mr. Clerk, now Lord Eldin, as to whether it was competent for the father to destroy the deed;—that, on Mr. Clerk having advised the father rather to alter than to destroy the deed, the bankrupt returned to Paisley, but that he did not arrive till after his father's death, which happened on the morning of the 6th of April 1816;—that he and his mother on the same day burnt the deed;—that on the 16th of the same month he granted an obligation to execute a new deed in terms of it, which had fallen aside, but of which the scroll was preserved; and that accordingly he had executed the deed under reduction on the 18th of March 1819.

In defence Boyd the trustee pleaded, That as there were no adminicles founded on, and as the deed of the father was of a testamentary nature, and could lawfully be destroyed by him at any time, the presumption was that he had done so, and it was neither competent nor possible to prove its tenor.

The Court, before answer, appointed Andersons 'to give in a 'condescendence of the adminicles founded on by them, and to pro-'duce the same.' These adminicles consisted of a part of the scroll of the deed, which contained only the description of the property—of an excerpt from the books of the writer of the deed, containing the charge for framing it, and stating that it was 'in favour of 'your wife and family'—of the discharged account, which was in the same terms—of the opinion of Lord Eldin, in which it was also mentioned that it was 'in favour of his wife and children'—of a copy of the letter of obligation granted subsequent to the destruction of the deed, containing what, 'it is supposed,' was the import of the deed—and, lastly, of the deed under reduction, which, it was alleged, was in terms of the original deed.

The Court, after ordering minutes by the parties, 'stating the 'cases and authorities upon which they found their plea, and, 'before answer, having allowed a proof to be taken to lie in re-'tentis before Lord Meadowbank, in place of Lord Eldin who 'was to be examined as a witness, and allowed, also before an-'swer, the bankrupt and his mother to be examined, their Lord-'ships appointed mutual memorials upon the nature and rele-'vancy of the present action.'

Thereafter, on advising the memorials, and the trustee having admitted that the deed once existed, their Lordships remitted the

following issue to the Jury Court:—'Whether the said deed of 'settlement, and any codicils added thereto, were destroyed by 'the order or with the knowledge of the said Hugh Anderson; 'or whether they were accidentally lost, or fraudulently de- 'stroyed, without his authority or knowledge, to the loss and in- 'jury of the pursuers?'

The Jury having found 'that the deed of settlement was in 'existence after the death of Hugh Anderson, and that it was 'destroyed without his directions or authority,' the Court 'al- 'lowed the pursuers to proceed with their action of proving the 'tenor of said deed,' and authorized the proof, which had been taken and sealed up, to be opened.*

Pursuers' Authorities.—4. Stair, 42. 3. 6. 7; 4. Ersk. 1. 54; 4. Bank. 29. 2; E. of March, July 19. 1743, (15825); A. v. B. Nov. 21. 1749, (15823); Kennoway, Feb. 18. 1752, (12438); Nimmo, July 26. 1771, (15825.)

Defender's Authorities.—4. Ersk. 1. 54; Campbell, June 20. 1747, (15821.)

C. J. F. Orr, W. S.—W. and A. G. Ellis, W. S.—Agents.

J. Miller, Petitioner.—*Alison.* No. 461.

His Creditors, Respondents.—*Ivory.*

Process—Sequestration—Discharge.—Where there is opposition to a petition for approval of composition and discharge, the Court will not remit it to be determined by the Lord Ordinary on the Bills during vacation.

July 11. 1827. 2d Division.

Miller, a sequestrated bankrupt, having given in a petition for approval of a composition, and for discharge, it was intimated by certain of his creditors that they meant to oppose it, and they accordingly took the petition out to see. This being near the end of the Session, and both parties being desirous to have the objections discussed before the Lord Ordinary on the Bills during vacation, a motion was made by Miller to have the petition remitted for that purpose to his Lordship, with power to decide on the application, and a minute was given in by the opposing creditors consenting thereto; but the Court refused the motion.

Their Lordships held, that unless the opposition was withdrawn, they could not remit a petition for approval of composition and discharge to the Lord Ordinary during vacation.

W. N. Grant, S. S. C.—Gibson-Craigs and Wardlaw, W. S.—Agents.

* This interlocutor was pronounced on the 9th of December 1826.

No. 462. W. MILLS and Others, Pursuers.—*Jeffrey—Forsyth—Cockburn.*
ALBION INSURANCE COMPANY and J. HAMILTON, Defenders.—*Sol.-Gen. Hope—Jardine.*

Proof—Insurance—Principal and Agent.—An insurance having been effected on a vessel, and thereafter renewed by a renewal receipt bearing reference to a policy by a special number; but no policy having been delivered, contrary to the usage of insurance offices in the place to send the policies to the insured—Held, in an action for delivery of a policy in the terms alleged by the insured to have been those agreed on, and for recovery of loss, that it was competent to prove the nature of the risk insured, contrary to the terms of the policy, by parole and circumstantial evidence; and that, in an action against a foreign insurance company and their agent in this country, the pursuers were entitled to a verdict generally against both the company and the agent, no evidence having been led by them, in a trial before a Jury, of the agent having exceeded his powers.

July 11. 1827.

2D DIVISION. Jury Court. B.

THE Robert Bruce steam-vessel, plying between Greenock and Liverpool, was, in the year 1819, insured against fire by the owners, Mills and seven others, each individually for his own share, with the Albion Fire and Life Insurance Company of London, at their office in Glasgow, where the defender Hamilton was their agent. No policy was delivered, and next year the owners gave an order for a joint insurance of the whole vessel, and received a memorandum or receipt stating that an insurance had been effected, without specifying the extent of the risk, or containing any restriction, and bearing that a policy would be forthwith prepared in London, and delivered to the insured on the third Monday of the ensuing month. This policy was in like manner never delivered; and, on the expiry of one year, a renewal was effected for another year, the renewal receipt delivered to Mills and others being dated from the office in London, and bearing reference to the policy by its particular number. The vessel having been destroyed by fire while at sea, they made a demand on the office for payment of the loss; but this was resisted, on the ground that, agreeably to the provisions of the 6th Geo. I. c. 18, (which, it was alleged, prevented all English companies, except two offices, from taking fire risks on vessels, unless while in port, or on rivers, canals, &c.) there was inserted in the policy a clause suspending the insurance while the vessel was at sea. Mills and others thereupon raised an action against the Company and Hamilton, their agent at Glasgow, before the Judge-Admiral, concluding to have them ordained to deliver a policy without any restricting clause, and thereafter, or on failure, to make payment of the loss. The Judge-Admiral having assoilzied the defenders, and, at the same time, found it unnecessary to decide a defence founded on the 6th Geo. I., Mills and the other owners brought a reduction,

in support of which they offered to prove, by circumstances as set forth in the report of the case ante, Vol. IV. No. 360, (which see,) that the Insurance Company had agreed by Hamilton to insure the vessel generally, both in port and at sea, without any restriction.

The Court, after some discussion as to the relevancy of these averments, remitted the cause to the Jury Court, where the following issue was sent to trial:—'It being admitted that on the '27th or 28th days of August 1821, the steam-vessel called the "Robert Bruce,' the property of the pursuers, was destroyed by 'fire while at sea, on her voyage betwixt Liverpool and Dublin: 'Whether the defenders promised and agreed to insure the pur-'suers to the extent of £3000, or about that sum, from all loss 'and damage which might be caused by fire to the said vessel 'while at sea as aforesaid; and whether the defenders have failed 'to perform the said promise and agreement, to the loss and da-'mage of the pursuers?'

At the trial of this issue, which came on before the Lord Chief Commissioner at Glasgow, the pursuers, in support of their case, tendered in evidence, inter alia, the insurance certificates or memoranda delivered in 1819 on their individual insurances to the eight owners of the vessel, of whom only six were now owners and parties to this action;—certain letters which had passed between Hamilton, the agent at Glasgow, and the secretary of the office at London, on occasion of these insurances in 1819 having been effected;—and parole proof as to the import of certain conversations between the pursuer Mills and the clerk of Hamilton at effecting the said insurance and renewals—as to the rate of the premium stipulated being that usually given for sea risks—as to the practice of the insurance offices at Glasgow to send the policies to the insured—and as to the policies not having been delivered in the present case.

To this evidence the defenders objected, as not legally admissible to contradict the terms of a written policy; but the Lord Chief Commissioner allowed it to go to the Jury.

The defenders then insisted that even if the alleged promise and agreement were legally proved, it was void under the 6th Geo. I. c. 18, and that the Jury should be directed accordingly to find a verdict for them; but the Lord Chief Commissioner directed the Jury, if they were satisfied with the evidence, to find for the pursuers. And the defenders further insisted that if a verdict were to be returned against them, the Jury should not be directed to return a general verdict against all the defenders, but either against the Albion Company the principals, or Hamilton

the agent; but the Lord Chief Commissioner directed the Jury, if their verdict should be in favour of the pursuers, to find against all the defenders generally. Against these directions the defenders excepted; and a verdict having been returned by the Jury in favour of the pursuers, and against the defenders generally, the latter took a Bill of Exceptions, in support of which they now argued,

1. As to the evidence,—That the insurance, under which the pursuers sought to recover, being effected by a renewal receipt issued from the office in London, bearing reference to a policy by number, which policy contained an exception of sea risk, and this receipt being accepted by the insured, completed the contract, in terms of the written policy so referred to, and so brought the case within the general rule of the law of evidence, that where a contract is reduced to writing, no evidence can be received of the agreement but the written instrument, except to the effect of explaining ambiguous expressions—correcting clerical blunders—establishing subsequent agreements to depart from the contract—or making out an action of damages, by proving fraud or deception, within none of which exceptions this case fell; and in regard to the certificates and correspondence relative to the individual insurances in 1819, that that was a different contract altogether, the circumstances attending which could not be evidence in regard to the contract in 1820, and renewal in 1821.

2. That the statute 6th Geo. I. c. 18, declared all insurances against sea risks, by any companies except the two monopolist offices, void and null; and,

3. That the defenders were entitled to a direction that the verdict should be either against the company or against the agent, because, if the agent had exceeded his powers, the company would not be liable, but only the agent; whereas, if the agreement was within his powers so as to bind the company, then he, as agent, could not be liable.

On the other hand, it was argued for the pursuers,

1. That it was only where a party had put his hand to a written instrument, or had accepted it as the measure of the agreement, that parole and extraneous evidence was incompetent to prove the agreement; but that the present action being for delivery of a policy in terms of an agreement, and no policy having been received by the pursuers, but merely a receipt bearing reference to a policy which they had not seen, and which they could not be held to have accepted without a knowledge of its tenor, they were entitled to prove the terms of the agreement by parole proof and otherwise,—both on the ground that they had not ac-

cepted the policy as the measure of their right, and that the receipt bearing reference to a policy which they had not seen, but which contained a clause contrary to their agreement, was in fraud of that agreement; and in reference to the certificates delivered on the insurance in 1819, and correspondence relative thereto, that the insurance in 1819 having been the original contract, of which the subsequent insurances were in reality only renewals, the circumstances which then took place were legal evidence to prove the nature of the contract.

2. That the statute 6th Geo. I. was an English statute, and could have no effect in a question with Scotch parties, and in regard to insurances effected in Scotland; and that fire at sea was not strictly speaking a sea risk, which alone fell within the monopoly of the two favoured companies; but besides, that the question had been reserved in the Court of Admiralty, and could not competently have entered into the consideration of the Jury under the issue sent to trial; and,

3. That, in the circumstances of the case, the defender Hamilton being the agent of a foreign company, and no evidence having been led by the defenders to distinguish their cases, the Judge had properly refused to direct a separate verdict.

The Court unanimously disallowed the bill.

LORD JUSTICE-CLERK.—I was somewhat moved by the defenders' argument, till I looked back to the terms of the original summons in the Court of Admiralty, which libels that the parties had conditioned for a policy in certain terms, and concludes that the defenders should be ordained to furnish a policy insuring against risk of fire any where, and at any time. Such being the conclusions of the action, and the issue being whether the defenders promised and agreed to insure in such terms, and failed, it appears to me clear that this case is quite apart from the ordinary case of an action for recovery under a policy of insurance. I cannot go along with an argument used from the Bar, that this issue is just the common issue for trying an action on a policy; on the contrary, I think that it would have been the proper issue, had no policy been prepared at all, and was the proper issue for trying this case. It is impossible to dispute the general principles maintained by the defenders as to the incompetency of controlling, by parole and circumstantial evidence, agreements reduced into writing by the parties; but it is in no respect contrary to that general principle that the objections were repelled in the special circumstances of this case; and I am of opinion that they were properly repelled. As to the alleged illegality of the insurance under the 6th Geo. I., that is not hujus loci: it may raise a question of law afterwards, but we have nothing to do with it here. And in regard to the last exception, considering

that no evidence was led by the company to show that the agent exceeded his powers, the Judge could do nothing but leave the case to the Jury, without any special direction, as there were no materials for making any distinction.

LORD GLENLEE concurred.

LORD PITMILLY.—If there had been a written policy delivered and finally accepted, we could have looked to nothing else; and to such a case the authorities cited by the defenders apply. But that is not the nature of this case. It is admitted that there was a bargain to get a policy, which was not delivered; and the question is, what were the terms of the bargain?—whether it was to include or exclude the risk at sea? The document constituting the bargain is the renewal receipt; but as the policy referred to in it was not delivered, we must go back to the memorandum of the order in 1819, which originated the transaction. The issue could not be otherwise than whether the defenders agreed to deliver a policy in certain terms; and I cannot entertain a doubt but that the evidence tendered on the trial was admissible, as otherwise no claim of this nature could ever be maintained. As to the evidence in regard to whether by practice the insurers were bound to send the policy, I am clear that it was admissible; because, if it had been incumbent on the insured to send for it, their neglecting so to do might have put them in the same situation as if they had received it, and they were therefore entitled to prove that the contrary was the rule in practice. In regard to the other exceptions, I agree with your Lordships that the second is not hujus loci; and as to the third, it is enough that the defenders led no evidence as to the agent's powers, and consequently the Judge could not discriminate between them.

LORD ALLOWAY.—I entirely concur on the same grounds.

Pursuers' Authorities.—1. Marshall, 349; Fell, p. 58-9, and Cases there cited; 1. Phillips, 692-5.

Defenders' Authorities.—Tait, 2d edit. p. 330, and Cases there cited; Cases in Murray's Reports, Vol. II. p. 409, and Vol. III. pp. 409, 432; Dictum of Lord Chancellor Eldon in Miller, July 30. 1822, (Shaw's Appeals, 308,) and in Hughes and Hamilton *v.* Gordon, (1. Bligh, 287. and 311); 1. Phillips, 6th edit. 529, 530-6-8, 554-5, and Cases there cited; Woolham, (7. Vesey, 211); Weston, (1. Taunt. 115); 1. Marshall, (edit. 1823,) 290, 349, and Cases there.

D. FISHER, S. S. C.—R. RUTHERFORD,—Agents.

Sir J. HAMILTON DALRYMPLE and Others, Suspenders.—*D. of F. Moncreiff—Cockburn.*
W. B. CALLANDER and Rev. W. FISHER, Respondents.—*Sol.-Gen. Hope—Skene.*

No. 463.

Interdict.—The Lord Ordinary having passed a bill of suspension, but refused interdict as to the excambion of a glebe, the Court altered, and granted interdict.

July 11. 1827.

2D DIVISION. Bill-Chamber. Lord Newton. B.

Æ. MACBEAN, W. S.—A. DALLAS, W. S.—Agents.

MACKILL MAXWELL, Pursuer.—*D. of F. Moncreiff—Cockburn—Maitland.*
DUKE of QUEENSBERRY'S EXECUTORS, Defenders.—*Jeffrey—Murray.*

No. 464.

Landlord and Tenant—Warrandice.—A tack having been granted to the tenant, 'his heirs, assignees, and subtenants,' with warrandice to him and 'his foresaids;' and the tenant having subset the farm with absolute warrandice, but without any assignation to the warrandice in the principal lease—Held, on the principal lease having been reduced, as ultra vires of the landlord, that the subtenant was entitled to bring an action of damages against the landlord under the warrandice.

THE late Duke of Queensberry, on the 4th February 1807, let the lands of Inglistone to William Lorimer, 'his heirs, assignees, 'and subtenants,' with absolute warrandice 'to the said William 'Lorimer and his foresaids.' In 1811 Lorimer subset the farm to the pursuer Maxwell, 'with and under the reservations, powers, 'and faculties specified and contained in the original lease,' and with absolute warrandice on his own part; but there was no assignment of the warrandice contained in the principal lease. The original lease having been reduced, as contrary to the entail of the estate of Queensberry, of which the lands formed part, in an action to which Lorimer alone was called, Maxwell at once gave up the possession, although there was no decree personally against him, and he thereupon raised an action of damages both against the principal tacksman Lorimer and the Executors of the Duke of Queensberry, founding on the warrandice in his subtack and the original lease.

July 11. 1827.

2D DIVISION. Ld. Cringletie. B.

By the Executors a preliminary defence was pleaded, That although they might be called by Lorimer in an action of relief under the clause of warrandice in the principal tack, yet, as they were not parties to the subtack, they could not be made directly liable to Maxwell the subtenant, with whom they had not contracted, and who had not obtained an assignment of the warrandice in the original tack.

To this it was answered for Maxwell, That as the lease was granted not only to Lorimer and his heirs, but also to 'subtenants,' the Executors, as representing the landlord, were bound to implement the warrandice to him as subtenant, in the same way as to the principal tenant himself, the more especially as the warrandice was in favour of Lorimer 'and his foresaids,' viz. 'his heirs, assignees, and subtenants,' whereby the landlord was directly bound in warrandice to the subtenant, without there being an express assignation, which was necessarily implied where the right to subset is granted by the lease.

The Lord Ordinary repelled the defence, stating in a note,—'The Lord Ordinary considers that the executors are directly 'liable to the pursuer. The lease was granted to William Lorimer, his heirs, assignees, and *subtenants*. The true import of 'this is, that the landlord gave power to his tenant to name a 'subtenant; that when a subtenant was named, the landlord 'granted the lease to him, and bound himself to warrant that 'sublease to him at all hands. The lease was granted as much 'to a subtenant as to the principal tacksman; and of course no 'assignation to the clause of warrandice was necessary, because 'the principal lease warranted the sublease the moment that it 'existed.' The Executors reclaimed against his Lordship's interlocutor; and the Court being equally divided, after allowing the case to stand over for reconsideration, required the opinion of the other Judges, all of whom, with the exception of Lords Medwyn and Newton, concurred in the following opinion:—'We are 'of opinion that the interlocutor of the Lord Ordinary ought to 'be adhered to. Cases may perhaps be figured, in which, from 'special circumstances, a subtenant would not have a direct claim 'against his landlord. But in all cases such as this, where the 'tack is expressly given to the principal tenant, his heirs, assignees, and *subtenants*, and where the warrandice is granted to 'the principal tenant and his foresaids, we are of opinion that the 'subtenant acquires every right competent to the principal, and 'can sue his landlord accordingly.' In conformity with this opinion, the reclaiming note for the Executors was refused.

Lords Medwyn and Newton gave a full opinion, of which the following is the general result:—'We are of opinion that the Duke 'of Queensberry not having been a party to the contract by which 'the relation of subtenant was constituted, the subtenant has no 'direct action against the landlord or his representatives, but can 'only claim damages from the principal tenant with whom he has 'contracted, who again will be entitled to claim damages from the 'landlord in virtue of the lease granted to him.'

LORDS JUSTICE-CLERK and PITMILLY entertained a view of the case similar to that of Lords Medwyn and Newton; while the opinion of LORDS GLENLEE and ALLOWAY was the same with that of the majority of the consulted Judges.

Pursuer's Authorities.—1. Bell on Leases, 470; 2. St. 9. 22; Downie, Jan. 31. 1815, (F. C.)

F. and J. BRODIE, W. S.—LAMONT and NEWTON, W. S.—Agents.

J. FAIRLIE, Pursuer.—*Fullerton.*
Sir JAMES FERGUSSON and Others, Defenders.—
D. of F. Moncreiff—Walker.

No. 465.

Entail.—A party having, for the purpose of creating a freehold qualification, granted a feu-right of certain lands on which the disponee was infeft, and having also disponed the superiority; and having thereafter executed an entail of his estates, including the lands in question, which was duly recorded, and, after his death, the disponee having executed a disposition of the lands in favour of the heirs called in the entail, and under the same conditions, &c. as were contained in the entail, setting forth that he (the disponee) held the lands merely in trust; but this disposition not having been recorded—Held—1.—That as the deed executed by the disponee had not been recorded, it could not prevent a creditor from proceeding with diligence; and question raised, but not decided, Which of the two deeds was the original entail, the recording whereof was necessary to secure the estate against creditors?

July 11. 1827.

2D DIVISION. Ld. Mackenzie. F.

THE late Sir Adam Fergusson held the lands of Drummellan in fee-simple. In 1799, for the purpose of creating a freehold qualification, he granted a feu-right of the lands, ex facie absolute, to his brother Lord Hermand, and his heirs and assignees whomsoever, on which Lord Hermand was infeft. Sir Adam then conveyed the superiority to his nephew Sir James Fergusson, the present defender, and the heirs-male of his body, whom failing, to his own heirs and assignees; but he neglected to obtain a reconveyance of the dominium utile from Lord Hermand. In 1807 Sir Adam, overlooking the circumstance that he was now divested of the lands of Drummellan, executed an entail of his estates, including these lands, as if they had been still feudally vested in his person, in favour of himself and the heirs of his own body, whom failing, of Sir James, and a certain series of substitutes. This entail contained the usual prohibitions, in particular against contracting debt, alienating any part of the entailed lands, or holding them under any other title than the entail, fenced with irritant and resolutive clauses; and it was duly recorded in the Register of Tailzies.

Sir Adam died in 1813, and was succeeded by his nephew, the defender, Sir James, who was served heir of entail in special to all the lands contained in the entail, except Drummellan,

as to which he made up no titles till 1822, when a conveyance was obtained from Lord Hermand, setting forth that the lands had been held by his Lordship in trust for Sir Adam, and that it was incumbent on him, in implement of the trust, to convey the lands to Sir James, and the heirs called by the deed of entail executed by Sir Adam, and under all the conditions, limitations, &c. contained in that entail, and accordingly disponing the lands to the heirs under the several prohibitions, which were copied verbatim from that deed. On this disposition Sir James was infeft, but it never was recorded in the Register of Tailzies.

In these circumstances, the pursuer Fairlie, a creditor of Sir James, raised an action against him and the other heirs of entail, concluding to have it declared, 1. That as the disposition by Lord Hermand had not been recorded, it was ineffectual against him, an onerous creditor, to prevent him from attaching the lands by diligence; 2. That the lands were liable for Sir James's debts, in respect of his possession as heir apparent to Sir Adam under his original titles in fee-simple; and, 3. That the lands were liable to be attached by adjudication or other legal diligence at the instance of the pursuer; and that such adjudications as might be led by him would be valid and effectual burdens on the lands. The Lord Ordinary having assoilzied the defenders, Fairlie reclaimed, and the Court appointed a hearing in presence.

The only question discussed at the Bar was, whether the entail executed by Sir Adam Fergusson, or that of Lord Hermand, was the original entail of the lands of Drummellan, which it was necessary to produce and record in terms of the act 1685. In support of the position that Lord Hermand's deed was the true entail, it was argued by the pursuer,

1. That the true entail must necessarily be the deed which imposes the fetters on the lands; and that although a person not feudally invest may have such a personal right as will enable him to create a personal obligation on the party in whose person the estate stands, to execute an entail of it in certain terms, still he cannot himself entail it; and the deed by which he creates the obligation to entail, in whatever shape it may be drawn, can never in reality amount to more than instructions or directions to the party feudally invest in the lands, as to the terms in which he was to execute the entail; and in reference to the arguments drawn from the conveyance to Lord Hermand by Sir Adam in the present case, being merely a trust which left the beneficial fee still in the person of Sir Adam, that, in point of fact, the conveyance to Lord Hermand was absolute, and the fee was vested unconditionally in his person, so that it could not be restored to Sir Adam by a mere renunciation of the right, as might be done

in the case of proper trusts; and besides, that in the case of Smollett, it had been found that the entail was properly recorded, when the deed so recorded was the conveyance by the trustees in terms of the trust-deed, and not the trust-deed itself, which, according to the defender's plea, must have been the proper entail; and,

2. That if Lord Hermand's deed did not require to be recorded, then the heirs would possess on titles setting forth fetters materially different from those of the entail which appeared on the record; because, although the two entails were word for word the same, yet the effect was in many instances totally different, seeing that Sir Adam's deed had reference to other lands contained in the same deed, and so created an irritancy of the whole lands by the sale of any part of all the lands included in the entail; while, in Lord Hermand's deed, the estate of Drummellan being the only lands mentioned, no irritancy would apply under it, although the whole lands contained in Sir Adam's deed were sold, provided no part of the lands of Drummellan were disponed.

On the other hand, it was contended by the defenders,

1. That there being in the narrative of Lord Hermand's deed an acknowledgment that he held the lands only in trust for Sir Adam, that was sufficient legal evidence of the existence of the trust; and consequently it must be held that the beneficial fee remained in Sir Adam, subject merely to the burden of the trust-conveyance to Lord Hermand, on the principle of the decision in the case of Edderline:—that Sir Adam, therefore, had power to execute an entail, and to call on Lord Hermand to renounce or denude in terms of it; and that Lord Hermand had no power to execute an entail, but could merely reconvey in implement of Sir Adam's entail, which, though requiring the reconveyance to complete it in point of form, was that which truly created the fetters, and ought to be recorded in the same way that the procuratory of resignation had been held in the case of Irvine to be the original tailzie, and not the charter which completed the right. It was further argued, that if Sir James had brought against Lord Hermand an adjudication in implement of his obligation to reconvey, and had obtained a charter of adjudication in terms of Sir Adam's entail, the 'original tailzie' to be recorded would not have been the charter, but Sir Adam's deed, which, by parity of reasoning, must, in the present case, be held to be the true entail; and,

2. That as to the supposed discrepancy in effect of the two deeds, as the one was a transcript of the other, and avowedly to give effect to it, it must necessarily be interpreted reasonably, so as to apply to the same lands.

The Court 'decerned in terms of the first conclusion of the 'libel as amended, and in so far repelled the defences, and re-'called the interlocutor of the Lord Ordinary,'—thereby finding that Lord Hermand's deed, in respect of its not being recorded, could form no bar to the diligence of the pursuer.

LORD GLENLEE.—As to the first conclusion, that Lord Hermand's deed, not being recorded, cannot be effectual against creditors, there can be no doubt. But the second is in a different situation, and I think there are no grounds for it at all; for the personal right under the entail required no title to complete it in the person of Sir Adam, and so Sir James could not possess the lands on apparency, but only under the deed. In fact, he had made up sufficient titles to carry this right, as he had been served heir of entail in special to the other lands contained in the deed; and this included a general service in the same character, and consequently carried all personal rights under the entail. Then, as to the last conclusion, I doubt the propriety of pronouncing any general declaratory judgment that lands are subject to diligence, when many things may occur to prevent their being carried away; and at all events, in this case I should not wish to come to a decision without consulting the other Judges. I think it will be enough to find, in terms of the first conclusion, that Lord Hermand's deed is no bar, and leave the pursuer to try the rest by doing diligence.

The other Judges having concurred in this proposal, judgment was pronounced accordingly.

Pursuer's Authorities.—Kinnaird, Nov. 26. 1751, (15611); Bloomfield, June 26. 1794, (15619); Smollett, May 14. 1807, (Ap. Tailzie, 12.)

Defender's Authorities.—Irvine, June 26. 1776, (Ap. Tailzie, 1.); Eddistone's Creditors, Jan. 14. 1801, (Ap. Adjudication, 11.); Douglas, Feb. 22. 1765; Russell, Jan. 31. 1792.

HUNTER, CAMPBELL, and CATHCART, W. S.—WALKER, RICHARDSON, and MELVILLE, W. S.—Agents.

July 11. 1827.

Act of Sederunt as to Reclaiming Notes.

By this Act it is ordained,

1. That Reclaiming Notes against Interlocutors passing or refusing Bills of Suspension or Advocation shall have appended thereto, as an Appendix, a printed copy of the Bill, and also a printed copy of the Answers when the Bill has been followed with Answers; and,

2. That Reclaiming Notes against the Interlocutor of a permanent Lord Ordinary in the Outer House, in a process of Suspension or Advocation, shall be accompanied with a printed copy of the Letters of Advocation, as well as of any other pleadings composing the record in the Outer House.

INDEX OF NAMES

IN

VOLUME V.

Pursuers.	*Defenders.*	No.	Page.
Aberdeen's Trustees, Earl of	Gordon, C. (Shand's Trustee,)	337	724
Adair, W.	Adair, Mrs. &c.	263	519
Agnew's Trustees,	Macneel, A. &c.	182	309
Aitken, R. &c.	Shotts and Airdrie Road Trustees,	84	135
Alexander, A.	Pinkerton, R.	115	185
Alexander, M. &c.	Inglis, J. and W.	41	53
Allan, D.	His Creditors,	168	291
Allan, R.	Swan, H. &c.	155	261
Anderson, Child, and Child, Petitioners,		275	543
Anderson, A.	Rintoul, R. &c.	350	744
Anderson, E.	Low, H. M.	31	44
Anderson, H.	Nelson, J.	438	899
Anderson, J.	Borthwick, W. &c.	424	879
Anderson, M. &c.	Boyd, J.	460	927
Anderson, W.	Sommers, W.	36	49
Anderson, W. &c.	Chalmers and Guthrie,	318	694
Arrot, C.	White, Dr. &c.	260	517
Atholl, Duke of, &c.	Wedderburn, H. S. &c.	95	153
Attorneys of J. Dye,	Thornton, R.	114	185
Auchinleck, J.	Craig and Baxter,	232	413
Auld, W.	Baird, T.	156	264
Austin, I. and S. &c.	Wallace, D. &c.	110	177
Austin, W. &c.	Grant and Anderson,	324	701
Baikie, J. &c.	Logie, Rev. W.	278	546
Baird, ——	His Creditors,	255	508
Baird, Rev. Dr. G. H.	Little's Trustees,	394	820
Bannatyne, R. &c. Petitioners,		310	684
Barbour, G.	Stewart, W.	284	559
Barbour, J.	Grierson, A.	292	603
Barclay, J.	Gillon, W. D.	413	850
Barry, D.	Geddes, J.	343	727

Pursuers.	*Defenders.*	No.	Page.
Baxter, W.	Ewart, R.	388	813
Bazett, Farquhar, Crawford, and Company,	Heugh's Trustees,	39	50
Beattie, E.	Haliburton, J.	142	236
Bell, D. J.	Graham, J.	140	234
Berry, J.	Allen, J. L.	129	212
Black, J.	Brown, W.	257	508
Blackett, E. &c.	Berry and Forster,	201	335
Blackie, Fullarton, and Company,	Aikman and Ireland,	334	719
Blaikie, J. Petitioner,		158	268
Bontine, R. C.	Carrick, J.	387	811
Borthwick, P.	Urquhart, Mrs.	146	242
Borthwick, P.	Wright, R. &c.	171	293
Boyd, J.	Shaw, J.	233	413
Braidwood, W. (Manager of Sea Insurance Company of Scotland,) &c.	Gavin, J. &c.	226	375
———	———	268	525
Brodie, W.	Brodie, M. &c.	440	900
Brown, G.	Duke of Gordon,	258	514
Brown, J.	Turner, J.	191	321
Brown, J.	Oliver, T. and A.	400	831
Brown, W.	Wemyss and Walker,	326	703
Bruce, J. C.	Borthwick, P.	261	517
Bruce, Miss M. M.	Bruce, M.	78	119
Bruce, T.	Bruce, J. C.	396	822
Bruce, W. &c.	Sandeman, P.	299	668
Bryce or Webster, Mrs.	Aitken, Mrs. &c.	392	817
Buccleuch, Duke of	Cunynghame, Sir W. A.	44	57
Buccleuch and Queensberry, Duke of	Grierson, A. &c.	304	676
———	Pringle or M'Murdo, Mrs. Anne, &c.	305	677
Buchanan, A. (Collector of Poor Rates for the City of Glasgow,)	Parker, C. S.	230	390
Buchanan, J.	Dunlop, J.	242	468
Buchanan, Mrs. &c.	Corbett, Borthwick, and Co.	382	805
Buie, A.	Lady Gordon, &c.	238	464
Bullock, J.	Crawfurd, A. &c.	335	721
Burns, A.	M'Kenzie, P.	108	174
Caldwell, A. &c.	Campbell, P.	331	715
Cameron, Colonel	Campbell's Trustees,	430	888
Campbell, A. &c.	Hill, R.	42	54
Campbell, A.	Campbell, C.	186	314
Campbell, A.	Hill, R.	264	521
Campbell, C.	Anderson, A.	58	86
Campbell, Lieut. D.	Macdonell, Colonel A.	231	412
Campbell, J. jun.	Smith, J.	373	794

Pursuers.	*Defenders.*	No.	Page.
Campbell, J. &c. (Macalister's Trustees,)	Macalister, K. M.	130	219
Campbell, S.	Campbell, A. &c.	209	344
Campbell, W.	Baird, R.	203	335
Cargill, T.	Baxter, J.	34	48
Carrick, D.	Mather, W. &c.	128	211
Chalmers, D.	Ogilvie, W.	276	544
Chalmers, J. and I.	Chalmers, D.	315	687
Christie, A. Petitioner,		170	293
Christie, C. Petitioner,		141	235
Clark, J.	Scott, J.	.73	109
Cleghorn, D. (T. Kyle's Trustee,)	Gordon, R. &c. (D. Kyle's Trustees,	122	203
Cochran, J.	Simpson, J.	314	687
Cockburn, J. &c.	Wallace, W. &c.	69	106
Collector of Poor Rates for the City of Glasgow,	Parker, C. S.	230	390
Colquhoun, C.	Dunn, J. and A.	395	822
Colquhoun, Sir J.	Colquhoun, R.	3	3
Cook, J.	Moffat and Couston,	361	774
Copland, J.	Bethune, Colonel A.	160	272
Cotton, G.	Manuel, Mrs.	256	508
Cotton, ——	Manuel, ——	Note.	659
Couper, Professor, &c.	Bute, Marquis of	401	831
Craig-Gibson, J.	Walker, Sir P.	409	843
Cranstoun and Hay,	Scott, W.	46	62
Crawford, J.	Walker and Russell,	152	259
Crawford's Trustees,	Haig, W. &c.	327	705
Cuningham and Bell,	M'Kirdy, Mrs.	187	315
Cunningham, M. &c.	Thomson, Mrs. &c.	390	814
Cunningham, W. &c.	Boyd, J. and Company,	302	671
Curator ad Litem of A. Austin, &c.	Grant, H. &c.	324	701
Currie, Dr. C.	Jardine and Currie,	404	838
Dallas, J.	Fraser, R.	403	837
Dalrymple, Sir J. H. &c.	Callander and Fisher,	463	935
Davidson, Rev. Dr.	Falconer, T.	83	131
Davidson, Rev. Dr.	Falconer, T.	352	748
Davidson, R.	Robertson, Mrs.	354	751
Davie or Laing, Mrs.	Denny, W.	443	903
De Witt, Mrs. Alletta	Young, J. &c.	180	309
Dick, J.	Fleshers of Stirling,	159	268
Dickson, J.	Dickson, A.	30	43
Dickson or Roughead, Mrs.	Hunter, J. &c.	157	266
Dirom, W.	Boyd, J.	360	773
Dodd, J.	Allan, A.	370	789
Doeg, J.	M'Donald, D. &c.	11	20
Doig, E. &c.	Fenton, J. &c.	271	533
Dollar, J.	Murdoch, J.	198	333
Dougall, J. &c.	Hutchison, W. &c.	135	224

Pursuers.	*Defenders.*	No.	Page.
Dove, J. and W.	Smith, A. &c.	346	734
Duke of Buccleuch and Queensberry,	Grierson, A. &c.	313	685
	Pringle or M'Murdo, Mrs. &c.	305	677
Duke of Queensberry's Executors,	Tait, C.	112	180
Dunbar, Sir B. &c.	Clyne, D.	402	836
Duncan, Dr.	Arnott, H.	407	840
Duncan, J.	Porterfield, J. C. &c.	74	111
Dundas or Wedderburn, Dame	Dundas, J.	372	790
Dunlop, J.	Christie, J. (Harley's Trustee,)	179	308
Dunlop, R.	Reid, J. and J.	376	796
Dunlop, R.	Nicolson, D.	451	915
Durham, W.	Guthrie, H.	313	685
Durward, J. Petitioner,		101	163
Dye, J. &c.	Thornton, R.	114	185
Earl of Aberdeen's Trustees,	Gordon, C. (Shand's Trustee,)	337	724
Earl of Eglintoun's Tutors,	Walker, W. F.	236	418
Earl of Elgin and Kincardine,	Fergusson, Mrs. &c.	148	243
Earl of Stair,	Earl of Stair's Trustees,	248	476
Elder, J.	Jack, A.	374	794
Elibank's Trustee, Lord	Hamilton, J. and T.	393	820
Eliott, Sir W. F.	Cocks and Company,	26	40
Erskine, H. D.	Erskine, Major G. F.	322	696
Erskine, J.	Scott, D.	366	783
Eyre, J. &c.	Earl of Moray,	448	912
Fair, W.	Stirling, Sir S.	176	306
Fairlie, J.	Fergusson, Sir J. &c.	465	937
Falconer, T. &c.	Sheills, J. and Company,	455	919
Farie, J. &c.	Muir, J. Executors of	423	878
Farquharson, A.	Barstow, Miss	150	251
Ferrier, C. (Lyell's Trustee,)	Young, Dr.	196	332
Fife, Earl of	Duff, Sir J. &c.	266	524
Fleming, B.	Wilson and M'Lellan,	445	906
Forbes' Trustees,	Welsh, W. A.	249	497
Fordyce, T. J.	Cockburn, T.	437	897
Fraser, A.	Fraser, A. T. F.	336	722
Fraser, J. B.	Fraser, G.	211	348
Fraser, Mrs.	Fraser, N. F.	174	301
Fraser, T. A.	Fraser, A. T. F.	68	104
Gall, A.	Adie, Mrs. &c.	67	104
Garden, F.	M'Coll, H.	80	123
Geddes, J.	Hopkirk, J.	351	747
Gibb and Macdonald,	Baghott, Sir P. &c.	348	739
Gibson, Thomson, and Co.	Cameron, ——	368	784
Gibson, Sir A. C. M.	Wills, J.	52	74
Gibson-Craig, J.	Walker, Sir P.	409	843

Pursuers.	*Defenders.*	No.	Page.
Gibson, Misses	Craig, R. &c.	340	726
Gibson, W.	Stewart, D.	380	803.
Gilchrist, D.	M'Gregor, J.	250	502
Gillespie, Wright, and Co.	Walkinshaw, &c.	357	764
Gillespie, Z.	Cowan's Trustees, &c.	161	273
Girdwood, C. and Co.	Pollock, Gilmour, & Co. &c.	254	507
Glasgow, Magistrates of	Dawson and Mitchell,	450	915
Glen, J.	Glen, S.	7	11
Glennie, W.	M'Phail, ——	65	100
Goddard, W.	Leith Dock Commissioners,	213	355
Golder, W.	Deans, J.	98	161
Gordon, A.	Royal Bank of Scotland,	102	164
Gordon, A.	Earl of Fife, &c.	281	550
Gordon, H.	Duncan, Mrs. J.	277	544
Gordon, H.	Duncan, Mrs. J.	291	602
Gordon, R. &c.	Romanes, J.	59	91
Gorman, E.	Hedderwick, J. W.	169	291
Gourlay, A.	Straton, D.	381	804
Governors of Heriot's Hospital, &c.	Dicksons, Brothers	61	94
Gow, H.	M'Donald, W.	245	472
Graham, Mrs.	M'Arthur and Johnston,	37	49
Graham, J. and I.	Graham, D. and J.	383	806
Graham, S.	Martin, W.	132	221
Grant, S.	M'Donald and Grant,	188	317
Greig, J.	Peebles, C.	345	738
Guild, J.	Leitch, W.	428	885
Guthrie, A. M. &c.	Miller, G.	328	711
Guthrie, W.	M'Eachern, P.	85	135
Halket, Sir C.	Elgin, Earl of	96	154
Halliday, J.	Halliday, T.	77	116
Hamilton, Dr.	Hope, Dr.	289	569
Hamilton, Duke of	Baillie, A. D. R. C. W.	20	30
Hamilton, H.	Wyllie, Mrs. J. &c.	338	716
Hamilton, J.	Durie's Trustees,	55	77
Hamilton, J.	M'Gilp and Shirra,	89	140
Harrowar's Trustees,	Erskine, Sir J. D.	178	307
——	Couper's Trustees,	224	374
Harvey's Trustees,	Leslie, J.	436	896
Harvie, R.	Ferguson, J.	8	14
Hay, J.	Grant and Smith,	312	685
Hay, P.	Henderson, J. &c.	375	796
Heatlie or Logan, Mrs.	Cathcart, W. &c.	207	341
Heddle, F.	Garioch, C.	252	503
Henderson and Scot,	Ker and Johnston,	389	813
Henderson or Mercer, Mrs.	Admiralty Clerks,	429	886
Heriot's Hospital, Governors of, &c.	Dicksons, Brothers	61	94
Heritors and Kirk-Session of Glassford,	Orr, R.	456	921

Pursuers.	*Defenders.*	No.	Page
Heritors of Strathblane,	Hamilton, Dr.	449	913
Hill, R.	Hay, General A. L.	134	223
Hodge, P.	Wedderspoon, W.	153	261
Hope, A. &c.	Magistrates of Selkirk, &c.	353	749
Hopkirk, T.	Sinclair, N. &c.	162	273
Horsefall, A. and J.	Virtue, J. and Company,	23	36
Houston's Executors,	Porterfield, J. C. &c.	75	115
Howie, J.		56	77
Hunter, D.	Maule, Hon. W.	144	238
Hunter, J.	Dickson or Roughead, J.	235	417
Hunter, W.	Executors of the Duke of Queensberry,	306	678
Innes, J. R.	Earl of Fife,	285	559
Innes's Representatives,	Earl of Peterborough's Executors,	309	681
Irvine, P.	Thom or Fiddes, Mrs. M.	272	534
Irving, ———	Burnett, ——	311	684
Jack, J. and J.	Barton, J.	212	353
Jackson, R.	Jackson, Mrs. E.	185	314
Jeffrey, W. (Anderson's Trustee,)	M'Gregor, J. and J.	35	48
Jeffreys, Miss J. and Mandatory,	Petitioners,	200	334
Jobson, D.	Reid, A.	332	715
Johnston, D.	Duncan, J.	297	660
Jollie or M'Neill, Mrs. &c.	Moir, W.	33	47
Justice, Miss	Callender, W. B.	48	68
Kay, A.	Ronaldson, Mrs. &c.	181	309
Kennedy, A. &c.	Wightman, J.	415	852
Kerr, J.	Kirkwall, Magistrates of	379	802
Ker, J.	Baird, J.	458	926
Kilpatrick, W.	Wighton and M'Kenzie,	435	895
King, J. &c.	King, J. &c.	53	76
King, J.	Shirra, W.	138	231
Kirk, D.	Kirk, W.	444	905
Kirk, Mrs. &c.		286	564
Kirkaldy, Magistrates of,	Petitioners,	434	894
Kirkpatrick, J.	Threshie, R.	287	565
Knox, D.	Brand and Berry,	329	714
Kyle, J.	Kyle, D.	82	128
Kyle, ———	His Creditors,	267	525
Laing and Rhind,	Anderson, A.	414	851
Lang, J.	Reid and Monach,	13	21
Lauder, Magistrates of	Spence, A. &c.	225	375
Lawrie and Son's Trustee,	Campbell, P.	127	208
Lawson, J.	Wardrop, J.	86	136
Lennox's Trustee,	Equitable Loan Company of Scotland,	117	192

Pursuers.	*Defenders.*	No.	Page.
Leslie, Rev. W.	Earl of Moray,	167	284
Lindsay or M'Gowan, Mrs. &c.	Anstruther's Trustees,	173	297
Lindsay, J.	Lindsay, P. &c.	183	310
Little, G.	Oswald, R. A. &c.	283	558
Lockhart, Mrs. &c.	Trotter, Sir C. &c.	87	136
Lockwood and Co. &c.	Davidson, C. F.	104	168
Logan or Heatlie, Mrs.	Cathcart, W. &c.	207	341
Low, Dr. J. &c.	Ballingall's Trustees,	244	472
Lyle, A.	Greig, J. &c.	410	845
Lynedoch, Lord, &c.	Ouchterlony, J.	216	358
M'Allister, A.	Giffin, R.	17	29
Macalister's Trustees,	Macalister, K. M.	130	219
M'Allisters,	M'Allisters,	420	862
M'Allister, Colonel M.	Trustees of Mrs. M'Allister,	421	871
M'Bain and Arbuckle,	Innes, Thomson, &c.	253	505
Maccallum, A.	Spears, J.	274	541
M'Cartney, A. (Manager of Commercial Bank,)	M'Kenzie, M.	202	335
M'Cartney, J. &c.	Crosbie, C.	177	306
M'Clymont, J.	Hughes, P.	210	346
M'Crone, J.	Campbell, D.	28	42
M'Culloch, J.	M'Nilidge, A.	247	473
M'Donald, A.	M'Donald, A.	107	173
M'Donald, J.	Denny, W.	378	801
Macdonald, Lord, &c.	Grant, P.	269	531
M'Donald, W.	Jackson, D. &c.	15	28
M'Farlane, A. &c.	Magistrates of Edinburgh,	298	665
M'Farlane, D.	Brown, J.	125	205
Macfarlane, J. and W.	A. B.	273	537
M'Farlane or Graham, Mrs.	Montrose, Duke of	24	38
M'Ghie, J.	Leishman, T.	355	758
M'Gowan or Lindsay, Mrs. &c.	Anstruther's Trustees,	173	297
M'Indoe, Anne, &c.	Lyon, G. &c.	60	92
M'Innes, Colonel	M'Allisters,	420	862
Macintosh, C.	Forbes, D. G.	342	727
Mackay, G.	Murray, D.	22	34
M'Kenzie, A.	M'Kenzie, Mrs. &c.	339	725
M'Kenzie, D.	Robertson, W. &c.	319	694
Mackenzie, K.	Fraser, W. &c.	290	597
M'Kenzie, M.	M'Intosh, C. &c.	417	856
M'Kenzie, M.	Rose, H.	453	916
———	Taylor, A.	457	925
M'Kenzie and Munro,	Magistrates of Dingwall, &c.	205	339
Mackenzie, R.	Fraser, C. &c.	307	679
M'Kenzie, T.	Smith, Jane	116	189
M'Kenzie, T.	Noble, R.	219	367
Mackie, C.	Harvie, Hall, and Company,	54	76
M'Lauchlan, J.	Carson, W.	91	147
M'Lean, C.	Bell, Mrs. &c.	139	232
M'Lean, J.	Simson, W.	18	29

Pursuers.	*Defenders.*	No.	Page.
Macleman, J.	Cameron, D.	221	370
M'Leod, J.	Hill, R.	1	1
M'Lure, W.	Jaffray, W. jun.	137	229
M'Michael, D.	Baird, H. and R. &c.	240	467
M'Nair, J.	M'Nair and Brunton,	223	372
M'Nair, J.	Gray and Woodrop,	347	735
M'Neel, A. &c.	Robertson, Mrs. Ann	321	696
M'Neill or Jollie, &c.	Moir, W.	33	47
M'Neill, D.	M'Neill, Lieut.-Colonel	49	72
Macpherson, Captain	Macpherson's Trustees,	399	826
MacRitchies and Murray,	Young, J. &c.	147	242
Magistrates of Glasgow,	Dawson and Mitchell,	450	915
Magistrates of Kirkaldy, Petitioners,		434	894
Magistrates of Lauder,	Spence, A. &c.	225	375
Malcolmson, M. &c.	Heddle, R.	279	549
Manager of Sea Insurance Company of Scotland,	Gavin, J. &c.	226	376
		288	525
Mar, Earl of	Alexander, G.	363	776
Marjoribanks, A. jun.	Houldsworth, T. &c.	222	372
Marr and Stephen,	Low, J.	239	466
Marston, J. and M.	Underwood, W.	120	200
Martin and Simpson,	Leishman, J.	362	775
Martin, W.	Underwood, W.	365	783
Maule, W.	Maule, Hon. W.	151	256
Maxwell, M.	Duke of Queensberry's Executors,	464	935
Megget, T. &c.	Davidson, C. F.	104	168
Megget, T.	Thomson, W.	164	275
Megget, T.	Brown, Rev. A.	208	343
Mein, A.	Taylor, M. &c.	364	779
Meldrum's Trustees,	Clark, A.	79	122
Meldrum, A.	Maitland, F. L. &c.	418	857
Menzies, J.	Berry, J. and J.	71	108
Menzies, J.	Abercromby, Sir G. &c.	103	168
Menzies, Sir N. &c.	Duff, A. &c.	427	884
Mickle, G.	Barnett, C.	246	473
Middleton, M. and E.	Yorstoun, Rev. J.	160	162
Milhollan, D.	Bertram, R. &c.	105	170
Millar, A.	Gibson-Craig, J. &c.	40	52
Millar, A.	Gibson-Craig, J. &c.	175	305
Miller, J. &c.	Brown, G. &c.	397	825
Miller, J.	His Creditors,	461	929
Miller and Carrick,	Morrison, J. &c.	301	671
Miller, T.	Wilson, R.	459	926
Milligan, Dr.	Milligan, P. &c.	126	206
Mills, W. &c.	Albion Insurance Co. &c.	462	930
Mitchell, J.	Brown, R. &c.	43	56
Mitchell, J.	Frew, J. &c.	446	909
Moffat, J.	Alston, J. &c.	431	889
Monteith, H. and Co.	Blackie, W.	166	280

Pursuers.	*Defenders.*	No.	Page.
Morrison, J.	Ramsay, J.	92	150
Morrison, J. &c.	Miller, M. &c. (Morrison's Trustees,)	192	322
Muir, A. &c.	Munro, D.	190	321
Munro or Rose, Mrs. C.	Ross, G.	294	605
Munro, D.	M'Neill, Mrs. E.	149	251
Munro, J.	Brown, P.	384	807
Munro, J.	Hogg, J.	391	817
Mure, W.	Railton, G.	194	328
Murray, J. &c.	Thomson, J. T.	38	50
Murray, R.	Thomson, W.	113	183
Murray, R.	Lawrie's Trustees,	259	515
Napier, D.	Lang, J.	25	40
Napier, J.	Thomson, J.	295	658
Nicol, J.	Crichton, R.	97	156
Nicol, R.	Christie, A.	425	882
Nicol, T.	Anderson's Trustees,	441	902
Officers of State,	Magistrates of Brechin,	303	672
Oswald, A.	Patison, J.	81	127
Oswald and Waddell,	Lawrie, J. &c.	227	381
Padon, J.	Bank of Scotland,	109	175
Paterson, D.	Mitchell, A.	29	43
Paterson's Trustees,	Brown, G.	123	204
Pattison, W. (Lawrie and Son's Trustee,)	Campbell, P.	127	208
Pedie, J.	Matheson, Mrs.	63	97
Pentland, G.	Paterson, D.	432	889
Perston, M.	M'Alister, J.	183	274
Peter, W.	Mitchell, W. &c.	118	193
Phin, J.	Magistrates of Auchtermuchty, &c.	317	690
Pollock, J.	Kirkwood, J.	405	839
Pollock, W.	Turnbull, J.	119	195
Porterfield, J. C.	Porterfield's Trustees,	367	784
Queensberry's Executors, Duke of	Tait, C.	112	180
		295	521
Ramsay, W.	Aitken, Dr.	27	41
Ramsay, W. and J.	M'Leish, J.	50	72
Reid, Captain J.	Walker, J.	90	140
Renny, Mrs. and Miss	Balderston, J.	193	328
Representatives of J. Innes,	Earl of Peterborough's Executors,	309	681
Rickman and Parry,	M'Lachlan, J.	323	700
Ritchie, A.	Mackay, J.	99	161

Pursuers.	*Defenders.*	No.	Page.
Robertson, J. &c.	Bell's Trustees,	154	261
Robertson's Trustee,	Oughterson, J. &c.	386	809
Rodgers, G. &c.	Harvie, T.	454	917
Rose or Munro, Mrs. C.	Ross, G.	294	605
Rose, H.	M'Leay and Horne,	426	883
Rose, H. &c.	Magistrates of Tain,	447	911
Ross, A. (D. Lennox's Trustee,)	Equitable Loan Company of Scotland,	117	192
Roughead or Dickson, Mrs.	Hunter, J. &c.	157	266
Rowand, M.	Stevenson, N.	442	903
Rowat, J.	Whitehead, Dr. R.	10	19
Roy, W. &c.	Wright, T. &c.	70	107
Rucker, J.	Fischer, J. G. C. &c.	45	61
Russell, C.	Macdonell, J.	143	238
Russell, C.	Earl of Breadalbane,	433	891
Russel, J. (Trustee of Falkirk Union Bank,)	Glen, R. &c.	133	221
Sassen, Madame	Campbell, Sir J.	439	899
Saunders, G.	Renfrewshire Banking Co.	288	565
Scot, Rev. D.	Ramsay, W. R.	220	367
Scott, A.	Farquharson's Trustees,	320	695
Scott, Mrs.	Napier, J.	234	414
Scott, P.	Gillespie, T.	300	669
Scott, Bonar, &c.	Drysdale, W.	316	689
Scott, T.	Patison, J. jun.	106	172
Scott, T.	Alexander, A.	330	714
Scot, T.	Leith Banking Company,	452	916
Scougal and Co.'s Trustee,	Porterfield, J. C. &c.	74	111
Sea Insurance Company of Scotland, &c.	Gavin, J. &c.	226	375
		268	525
Sharpe, J.	M'Gown, D.	88	139
Sharp, J.	M'Gowan, D.	172	297
Sharp, J.	Thomson, G. &c.	338	724
Sharrat, S.	Turnbull, J.	217	361
Shaw, J. &c.	Forbes, W. &c.	356	761
Sim, D.	Stewart, G.	408	841
Sloan, Mrs.	Birtwhistle, J.	349	742
Smith and Tasker,	Robertson, R. &c.	412	848
Smith, D. Petitioner,		214	357
Smith, J. &c.	Logan, W.	21	32
Smith, J.	Bank of Scotland,	64	98
Smith, J.	Hart, J. &c.	121	201
Smith, J.	Miller, P.	204	358
Smith, J.	Innes, Sir H.	218	364
Smith, P. &c.	Aitken, R. &c.	206	340
Smyth, C.	Nisbet, A.	229	388
Smyth, J.	Ninian, Q. D.	6	8
Soutar, A. Representatives of	Soutar, J.	422	876
Speir, R.	Dunlop, J.	344	729

Pursuers.	*Defenders.*	No.	Page.
Spence, J.	Eadie, J.	51	72
Spence, W.	Ross, A.	9	17
Spiers, A.	Ardrossan Canal Company,	358	764
Sproat, J.	Mure, W. &c. (Corrie's Trustees,)	47	66
Stair, Earl of	Earl of Stair's Trustees,	248	476
Stafford, Marquis of, &c.	M'Kenzie, M.	406	839
Stark, J.	Edmonstone, Sir A.	32	45
State, Officers of	Magistrates of Brechin,	303	672
Steel, J.	Hamilton, A.	385	809
Stein, R. &c.	Stein, Misses	66	101
Stephen, J. &c.	Low, J.	239	466
Stewart, A.	Lang, G.	2	2
Stewart, A.	A. B.	296	658
Stewart, D.	Mitchell, Colonel, &c.	124	204
Stewart, F. C.	Fullerton, S. M. &c.	237	418
Stewart, Sir H.	M'Donald, C. J.	19	29
Stewart, J.	Cameron, D.	282	557
Stewart, Lieutenant	Earl of Fife, &c.	228	383
Strathblane, Heritors of	Hamilton, Dr.	449	913
Sutherland, D.	Paul, H. &c.	325	703
Sutherland, Mrs. &c.	Fraser, Mrs. &c.	76	116
Tait, C.	Mackenzie, J.	197	338
Tait, J. &c.	Earl of Lauderdale,	195	330
Tatnall, J. B.	Reid, A. &c.	165	277
Taylor, Major	Forbes, Sir W. and Co.	369	785
Taylor, J.	Wight, G.	377	797
Taylor, J. and Sons,	Hall, R. &c.	419	860
Taylor, R.	Ferguson, J.	411	848
Thomson, A.	Harvie, T.	136	227
Thomson, A.	Miller, J.	371	789
Thomson, J. and Sons,	Broom, J. &c.	241	468
Torry, A. &c.	Spence, J.	398	825
Trotter, Y.	Trotter, W. &c.	57	78
Trustee of Falkirk Union Bank,	Glen, R. &c.	133	221
Trustee of T. Kyle,	Trustees of D. Kyle,	122	203
Trustee of Lawrie and Son,	Campbell, P.	127	208
Trustee of D. Lennox,	Equitable Loan Company of Scotland,	117	192
Trustees, Earl of Aberdeen's	Gordon, C. (Shand's Trustee,)	337	724
Trustees of R. V. Agnew,	Macneel, A. &c.	182	309
Trustees of Crawford,	Haig, W. &c.	327	705
Trustees of Paterson,	Brown, G.	123	204
Tullis, R.	Houy, G.	92	149
Tullis, R.	Bruce, J. C.	270	533
Turner, E.	Gibb and Macdonald,	215	358
Tutor ad Litem of I. and S. Austin,	Wallace, D. &c.	110	177
Tutors, Earl of Eglintoun's	Walker, W. F.	286	418

Pursuers.	*Defenders.*	No.	Page.
Waddel, W.	Park, R.	131	221
Walker, A.	Inglis, W.	341	726
Walker, W. F.	Earl of Eglintoun's Tutors,	145	240
Walker, W.	Grieve, J.	243	469
Wallace, D.	Anderson, W.	111	179
Watson, J.	Grindlay, J.	4	3
Watt, J.	Anderson, W. and Son,	62	96
Watt, J.	M'Intosh, R.	199	334
White, J.	M'Farlane, W.	72	106
White, W.	Ballantyne, R.	14	22
Wight, A.	Dewar, Isabella	280	549
Wightman, J.	Bonar, T.	16	29
Wigtonshire, Commissioners of Supply of	Officers of State, &c.	359	767
Wilson, A.	Millar, G.	12	20
Wilson and Alpine,	Glasgow Society of Teachers,	5	6
Wilson, J.	Mitchell, J. and J.	189	318
Wilson, J.	Jamieson, H.	262	518
Wilson, W.	Dalziel, J.	308	681
Wright and Anderson,	O'Henly, D.	184	311
Wright, J.	Watson, Janet	293	604
Wright, J.	M'Gregor, J.	416	855
Young, G.	Paton, G.	94	151
Young, W.	Robertson, J.	251	502

Defenders.	*Pursuers.*	No.	Page.
A. B.	Macfarlane, J. and W.	273	537
——	Stewart, A.	296	658
Abercromby, Sir G. &c.	Menzies, J.	103	168
Adair, Mrs. &c.	Adair, W.	263	519
Adie, Mrs. &c.	Gall, A.	67	104
Admiralty Clerks,	Henderson or Mercer, Mrs.	429	886
Aitken, Dr.	Ramsay, W.	27	41
Aitken, R. &c.	Smith, P. &c.	206	340
Aitken, Mrs.	Bryce or Webster, Mrs.	392	817
Aikman and Ireland,	Blackie, Fullarton, and Co.	334	719
Albion Insurance Co. &c.	Mills, W. &c.	462	930
Alexander, A.	Scott, T.	330	714
Alexander, G.	Mar, Earl of	363	776
Allan, A.	Dodd, J.	370	789
Allan's Creditors,	Allan, D.	168	291
Allen, J. L.	Berry, J.	129	212
Alston, J. &c.	Moffat, J.	431	889
Anderson, A.	Campbell, C.	58	86
Anderson, A.	Laing and Rhind,	414	851
Anderson, W. and Son,	Watt, J.	62	96

Defenders.	*Pursuers.*	No.	Page.
Anderson, W.	Wallace, D.	111	179
Anderson's Trustees,	Nicol, T.	441	902
Anstruther's Trustees,	Lindsay or M'Gowan, Mrs. &c.	173	297
Ardrossan Canal Company,	Spiers, A.	358	764
Arnott, H.	Duncan, Dr.	407	840
Auchtermuchty, Magistrates of, &c.	Phin, J.	317	690
Baghott, Sir P. &c.	Gibb and Macdonald,	348	739
Baillie, A. D. R. C. W.	Hamilton, Duke of	20	30
Baird's Creditors,	Baird, ——	255	508
Baird, H. and R. &c.	M'Michael, D.	240	467
Baird, J.	Ker, J.	458	926
Baird, R.	Campbell, W.	203	335
Baird, T.	Auld, W.	156	264
Balderston, J.	Renny, Mrs. and Miss	193	328
Ballingall's Trustees,	Low, Dr. J. &c.	244	472
Ballantyne, R.	White, W.	14	22
Bank of Scotland,	Smith, J. &c.	64	98
———	Padon, J.	109	175
Barnett, C.	Mickle, G.	246	473
Barton, J.	Jack, J. and J.	212	353
Barstow, Miss	Farquharson, A.	150	251
Baxter, J.	Cargill, T.	34	48
Bell, Mrs. &c.	M'Lean, C.	139	232
Bell's Trustees,	Robertson, J. &c.	154	261
Berry, J. and J.	Menzies, J.	71	108
Berry and Forster,	Blackett, E. &c.	201	335
Bertram, R. &c.	Milhollan, D.	105	170
Bethune, Colonel A.	Copland, J.	160	272
Birtwhistle, J.	Sloan, Mrs.	349	742
Blackie, W.	Monteith, H. and Co.	166	280
Bonar, T.	Wightman, J.	16	29
Borthwick, P.	Bruce, J. C.	261	517
Borthwick, W. &c.	Anderson, J.	424	879
Boyd, J. and Company,	Cunningham, W. &c.	302	671
Boyd, J.	Dirom, W.	360	773
Boyd, J.	Anderson, M. &c.	460	927
Brand and Berry,	Knox, D.	329	714
Breadalbane, Earl of	Russell, C.	433	891
Brechin, Magistrates of	Officers of State,	303	672
Brodie, M. &c.	Brodie, W.	440	900
Broom, J. &c.	Thomson, J. and Sons,	241	468
Brown, Rev. A.	Megget, T.	208	343
Brown, G.	Paterson's Trustees,	123	204
Brown, G. &c.	Miller, J. &c.	397	825
Brown, J.	M'Farlane, D.	125	205
Brown, P.	Munro, J.	384	807
Brown, R. &c.	Mitchell, J.	43	56
Brown, W.	Black, J.	257	508
Bruce, J. C.	Tullis, R.	270	533

Defenders.	*Pursuers.*	No.	Page.
Bruce, J. C.	Bruce, T.	396	822
Bruce, M.	Bruce, Miss M. M.	78	119
Burnett, ——	Irving, ——	311	684
Bute, Marquis of	Couper, Professor	401	831
Callander and Fisher,	Dalrymple, Sir J. H. &c.	463	935
Callender, W. B.	Justice, Miss	48	69
Cameron, D.	Macleman, J.	221	370
——	Stewart, J.	282	557
Cameron, ——	Gibson, Thomson, and Co.	368	784
Campbell, A. &c.	Campbell, S.	209	344
Campbell, C.	Campbell, A.	186	314
Campbell, D.	M'Crone, J.	28	42
Campbell, Sir J.	Sassen, Madame	439	899
Campbell, P.	Pattison, W. (Lawrie and Son's Trustee,)	127	208
Campbell, P.	Caldwell, A. &c.	331	715
Campbell's Trustees,	Cameron, Colonel	430	888
Carrick, J.	Bontine, R. C.	387	811
Carson, W.	M'Lauchlan, J.	91	147
Cathcart, W. &c.	Heatlie or Logan, Mrs.	207	341
Chalmers and Guthrie,	Anderson, W. &c.	318	674
Chalmers, D.	Chalmers, J. and I.	315	687
Christie, A.	Nicol, R.	425	882
Christie, J. (Harley's Trustee,)	Dunlop, J.	179	308
Clark, A.	Meldrum's Trustees,	79	122
Clyne, D.	Dunbar, Sir B. &c.	402	836
Cockburn, T.	Fordyce, T. J.	437	897
Cocks and Company,	Eliott, Sir W. F.	26	40
Colquhoun, R.	Colquhoun, Sir J.	3	3
Corbett, Borthwick, and Co.	Buchanan, Mrs.	382	805
Couper's Trustees,	Harrowar's Trustees,	224	374
Cowan's Trustees, &c.	Gillespie, Z.	161	273
Craig and Baxter,	Auchinleck, J.	232	413
Craig, D. &c.	Gibson, Misses	340	726
Crawfurd, A. &c.	Bullock, J.	335	721
Crichton, R.	Nicol, J.	97	156
Crosbie, C.	M'Cartney, J. &c.	177	306
Cunynghame, Sir W. A.	Buccleuch, Duke of	44	57
Dalrymple, General, &c.	Milhollan, D.	105	170
Dalziel, J.	Wilson, W.	308	681
Davidson, C. F.	Lockwood and Co. &c.	104	168
Dawson and Mitchell,	Magistrates of Glasgow,	450	915
Deans, J.	Golder, W.	98	161
Denny, W.	M'Donald, J.	378	801
Denny, W.	Davie or Laing, Mrs.	443	903
Dewar, Isabella	Wight, A.	280	549
Dickson, A.	Dickson, J.	30	43
Dickson or Roughead, J.	Hunter, J.	235	417

Defenders.	*Pursuers.*	No.	Page.
Dicksons, Brothers,	Governors of Heriot's Hospital, &c.	61	94
Dingwall, Magistrates of, &c.	M'Kenzie and Munro,	205	339
Drysdale, W.	Scott, P. &c.	316	689
Duff, A. &c.	Menzies, Sir N. &c.	427	884
Duff, Sir J. &c.	Earl of Fife,	266	524
Duke of Queensberry's Executors,	Duke of Buccleuch and Queensberry,	304	676
———	———	305	677
———	Hunter, W.	306	678
———	Maxwell, M.	464	935
Duncan, Mrs. J.	Gordon, H.	277	544
Duncan, Mrs. J.	Gordon, H.	291	602
Duncan, J.	Johnston, D.	297	660
Dundas, J.	Dundas or Wedderburn, Dame	372	790
Dunlop, J.	Buchanan, J.	242	468
Dunlop, J.	Speir, R.	344	729
Dunn, J. and A.	Colquhoun, C.	395	822
Durie's Trustees,	Hamilton, J.	55	77
Eadie, J.	Spence, J.	51	72
Earl of Breadalbane,	Russell, C.	433	891
Earl of Eglintoun's Tutors,	Walker, W. F.	145	240
Earl of Elgin,	Halket, Sir C.	96	154
Earl of Fife, &c.	Stewart, Lieutenant	228	383
Earl of Lauderdale,	Tait, J. &c.	195	330
Earl of Moray,	Leslie, Rev. W.	167	284
Earl of Moray,	Eyre, J. &c.	448	912
Earl of Peterborough's Executors,	Innes, J. Representatives of	309	681
Earl of Stair's Trustees,	Earl of Stair,	248	476
Edinburgh, Magistrates of	M'Farlane, A. &c.	298	665
Edmonstone, Sir A.	Stark, J.	32	45
Erskine, Major G. F.	Erskine, H. D.	322	696
Erskine, Sir J. D.	Harrowar's Trustees,	178	307
Ewart, R.	Baxter, W.	388	813
Falconer, T.	Davidson, Rev. Dr.	83	131
Falconer, T.	Davidson, Rev. Dr.	352	748
Farquharson's Trustees,	Scott, A.	320	695
Fenton, J. &c.	Doig, E. &c.	271	533
Ferguson, J.	Taylor, R.	411	848
Fergusson, Sir J. &c.	Fairlie, J.	465	937
Fergusson, Mrs. &c.	Earl of Elgin and Kincardine,	148	243
Fiddes or Thom, Mrs. M.	Irvine, P.	272	534
Fife, Earl of, &c.	Stewart, Lieutenant	228	383
Fife, Earl of, &c.	Gordon, A.	281	550
Fife, Earl of	Innes, J. R.	285	559
Fischer, J. G. C. &c.	Rucker, J.	45	61
Fleshers of Stirling,	Dick, J.	159	268
Forbes, D. G.	Macintosh, C.	342	727

Defenders.	*Pursuers.*	No.	Page.
Forbes, Sir W. and Co.	Taylor, Major J. &c.	369	785
Forbes, W. &c.	Shaw, J. &c.	356	761
Fraser, A. T. F.	Fraser, T. A.	68	104
Fraser, A. T. F.	Fraser, A.	336	722
Fraser, C. &c.	Mackenzie, R.	307	679
Fraser, G.	Fraser, J. B.	211	348
Fraser, Mrs. &c.	Sutherland, Mrs. &c.	76	116
Fraser, N. F.	Fraser, Mrs.	174	301
Fraser, R.	Dallas, J.	403	837
Fraser, W. &c.	Mackenzie, K.	290	597
Frew, J. &c.	Mitchell, J.	446	909
Fullerton, S. M.	Stewart, F. C.	237	418
Garioch, C.	Heddle, F.	252	503
Gavin, J. &c.	Braidwood, W. (Manager of Sea Insurance Company of Scotland,) &c.	226	375
		268	525
Geddes, J.	Barry, D.	343	727
Gibb and Macdonald,	Turner, E.	215	358
Gibson-Craig, J. &c.	Millar, A.	40	52
Gibson-Craig, J. &c.	Millar, A.	175	305
Giffin, R.	M'Allister, A.	17	29
Gillespie, T.	Scott, P.	300	669
Gillon, W. D. &c.	Barclay, J.	413	850
Glasgow, Magistrates of, &c.	Aitken, R. &c.	84	135
Glasgow Society of Teachers,	Wilson and Alpine,	5	6
Glen, R. &c.	Russel, J. (Trustee of the Falkirk Union Bank,)	133	221
Glen, S.	Glen, J.	7	11
Gordon, C. (Shand's Trustee,)	Earl of Aberdeen's Trustees,	337	724
Gordon, Duke of	Brown, G.	258	514
Gordon, Lady, &c.	Buie, A.	238	464
Gordon, R. &c. (D. Kyle's Trustees,)	Cleghorn, D. (T. Kyle's Trustee,)	122	203
Graham, D. and J.	Graham, Mrs.	383	806
Graham, J.	Bell, D. J.	140	234
Grant and Anderson,	Austin, W. &c.	324	701
Grant and Smith,	Hay, J.	312	685
Grant, P.	Macdonald, Lord, &c.	269	581
Gray and Woodrop,	M'Nair, J.	347	735
Greig, J. &c.	Lyle, A.	410	845
Grierson, A.	Barbour, J.	292	603
Grierson, A. &c.	Duke of Buccleuch and Queensberry,	304	676
Grieve, J.	Walker, W.	243	469
Grindlay, J.	Watson, J.	4	3
Guthrie, H.	Durham, W.	313	685
Haig, W. &c.	Crawford's Trustees,	327	705
Haliburton, J.	Beattie, C.	142	236

Defenders.	*Pursuers.*	No.	Page.
Hall, R. &c.	Taylor, J. and Sons,	419	860
Halliday, T.	Halliday, J.	77	116
Hamilton, A.	Steel, J.	385	809
Hamilton, Dr.	Heritors of Strathblane,	449	913
Hamilton, J. and T.	Elibank's Trustee, Lord	393	820
Hamilton, J. &c.	Mills, W. &c.	462	930
Hart, J. &c.	Smith, J.	121	201
Harvie, Hall, and Company,	Mackie, C.	54	76
Harvie, T.	Thomson, A.	136	227
Harvie, T.	Rodgers, G. &c.	454	917
Hay, General A. L.	Hill, R.	134	223
Hedderwick, J. W.	Gorman, E.	169	291
Heddle, R.	Malcolmson, M. &c.	279	549
Henderson, J. &c.	Hay, P.	375	796
Henderson, Sir R. &c. (Anstruther's Trustees,)	Lindsay or M'Gowan, Mrs. &c.	173	297
Heugh's Trustees,	Bazett, Farquhar, Crawford, and Company,	39	50
Hill, R.	M'Leod, J.	1	1
Hill, R.	Campbell, A. &c.	42	54
Hill, R.	Campbell, A.	264	521
Hogg, J.	Munro, J.	391	817
Hope, Dr.	Hamilton, Dr.	289	569
Hopkirk, J.	Geddes, J.	351	747
Houldsworth, T. &c.	Marjoribanks, A. jun.	222	372
Houy, G.	Tullis, R.	92	149
Hughes, P.	M'Clymont, J.	210	346
Hunter, J. &c.	Dickson or Roughead, Mrs.	157	266
Hutchison, W. &c.	Dougall, J. &c.	135	224
Hyslop, A. &c.	Milhollan, D.	105	170
Inglis, J. and W.	Alexander, M. &c.	41	53
Inglis, W.	Walker, A.	341	726
Innes, Sir H.	Smith, J.	218	364
Innes, Thomson, &c.	M'Bain and Arbuckle,	253	505
Jack, A.	Elder, J.	374	794
Jackson, D. &c.	M'Donald, W.	15	28
Jackson, Mrs. E.	Jackson, R.	185	314
Jaffray, W. jun.	M'Lure, W.	137	229
Jamieson, H.	Wilson, J.	262	518
Jardine, P. &c.	Currie, Dr.	404	838
Ker and Johnston,	Henderson and Scot,	389	813
King, J. &c.	King, J. &c.	53	76
Kirk, W.	Kirk, D.	444	905
Kirkwall, Magistrates of	Kerr, J.	379	802
Kirkwood, J.	Pollock, J.	405	839
Kyle, D.	Kyle, J.	82	128
Kyle's Creditors,	Kyle, ———	267	525
Laing, G.	Stewart, A.	2	2

Defenders.	*Pursuers.*	No.	Page.
Lang, J.	Napier, D.	25	40
Lauderdale, Earl of	Tait, J. &c.	195	330
Lawrie, J. &c.	Oswald and Waddell,	227	381
Lawrie's Trustees,	Murray, R.	259	515
Leishman, J.	Martin and Simpson,	362	775
Leishman, T.	M'Ghie, J.	355	758
Leitch, W.	Guild, J.	428	885
Leith Banking Company,	Scot, T.	462	916
Leith Dock Commissioners,	Goddard, W.	213	355
Leslie, J.	Harvey's Trustees,	436	896
Lindsay, P. &c.	Lindsay, J.	183	310
Little's Trustees,	Baird, Rev. Dr.	394	820
Logan, W.	Smith, J.	21	32
Logie, Rev. W.	Baikie, J. &c.	278	546
Low, H. M.	Anderson, E.	31	44
Low, J.	Marr and Stephen,	239	466
Lyon, G. &c.	M'Indoe, Anne, &c.	60	92
M'Alister, J.	Preston, M.	163	274
Macalister, K. M.	Macalister's Trustees,	130	219
M'Allisters,	M'Innes, Colonel	420	862
M'Allister, Mrs. Trustees of	M'Allister, Colonel M.	421	872
M'Arthur and Johnston,	Graham, Mrs.	37	49
M'Coll, H.	Garden, F.	80	123
M'Donald, A.	M'Donald, A.	107	173
M'Donald, C. J.	Stewart, Sir H.	19	29
M'Donald, D. &c.	Doeg, J.	11	20
M'Donald and Grant,	Grant, S.	188	317
M'Donald, W.	Gow, H.	245	472
Macdonell, Colonel A.	Campbell, Lieut. D.	231	412
Macdonell, J.	Russell, C.	143	238
M'Eachern, P.	Guthrie, W.	85	135
M'Farlane, W.	White, J.	72	106
M'Gilp and Shirra,	Hamilton, J.	89	140
M'Gown, D.	Sharpe, J.	88	139
M'Gowan, D.	Sharp, J.	172	297
M'Gregor, J. and J.	Jeffrey, W.	35	48
M'Gregor, J.	Gilchrist, D.	250	502
M'Gregor, J.	Wright, J.	416	855
M'Intosh, C.	M'Kenzie, M.	417	858
M'Intosh, R.	Watt, J.	199	334
Mackay, J.	Ritchie, A.	99	161
Mackenzie, J.	Tait, C.	197	333
M'Kenzie, M.	M'Cartney, A.	202	336
M'Kenzie, Mrs. &c.	M'Kenzie, A.	339	726
M'Kenzie, M.	Stafford, Marquis of, &c.	406	839
M'Kenzie, P.	Burns, A.	108	174
M'Kenzie, T. &c.	M'Kenzie, A.	339	726
M'Kinlay, Mrs. &c.	M'Leun, C.	139	252
M'Kirdy, Mrs.	Cuningham and Bell,	187	315
M'Lachlan, J.	Rickman and Parry,	323	709
M'Leay and Horne,	Rose, H.	426	882

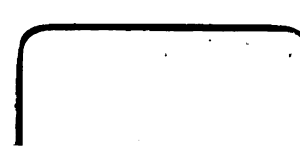
Defenders.	*Pursuers.*	No.	Page.
M'Leish, J.	Ramsay, W. and J.	50	72
M'Murdo or Pringle, Mrs. Anne, &c.	Buccleuch and Queensberry, Duke of	305	677
M'Nair and Brunton,	M'Nair, J.	223	372
Macneel, A. &c.	Trustees of R. V. Agnew,	182	309
M'Neill, Lieut.-Colonel	M'Neill, D.	49	72
M'Neill, Mrs. E.	Munro, D.	149	251
M'Nilidge, A.	M'Culloch, J.	247	478
M'Phail, ——	Glennie, W.	65	100
Macpherson's Trustees,	Macpherson, Captain	399	826
Magistrates of Auchtermuchty, &c.	Phin, J.	317	690
Magistrates of Brechin,	Officers of State,	303	672
Magistrates of Dingwall, &c.	M'Kenzie and Munro,	205	339
Magistrates of Edinburgh,	M'Farlane, A. &c.	298	665
Magistrates of Glasgow,	Aitken, R. &c.	84	135
Magistrates of Tain,	Rose, H. &c.	447	911
Maitland, F. L.	Meldrum, A.	418	857
Manuel, Mrs.	Cotton, G.	256	508
Manuel, ——	Cotton, ——	Note.	659
Martin, W.	Graham, S.	132	221
Mather, W. &c.	Carrick, D.	128	211
Matheson, Mrs.	Pedie, J.	68	97
Maule, Hon. W.	Hunter, D.	144	238
Maule, Hon. W.	Maule, W.	151	256
Millar, A. &c.	Milhollan, D.	105	179
Miller, G.	Wilson, A.	12	20
Miller, G.	Guthrie, A. M. &c.	328	711
Miller, J.	Thomson, A.	371	789
Miller, M. &c.	Morrison, J. &c.	192	322
Miller, P.	Smith, J.	204	338
Miller's Creditors,	Miller, J.	461	929
Milligan, P. &c.	Milligan, Dr.	126	206
Mitchell, A.	Paterson, D.	29	43
Mitchell, Colonel, &c.	Stewart, D.	124	204
Mitchell, J. and J.	Wilson, J.	189	318
Mitchell, W. &c.	Peter, W.	118	193
Moffat and Couston,	Cook, J.	361	774
Moir, W.	M'Neill or Jollie, Mrs. &c.	33	47
Montrose, Duke of	M'Farlane or Graham, Mrs.	24	38
Moray, Earl of	Leslie, Rev. W.	167	284
Moray, Earl of	Eyre, J. &c.	448	912
Morrison, J. &c.	Miller and Carrick,	301	671
Muir, J. Executors of	Farie, J. &c.	423	878
Munro, D.	Muir, A. &c.	190	321
Murdoch, J.	Dollar, J.	108	833
Mure, W. &c. (Corrie's Trustees,)	Sproat, J.	47	66
Murray, D.	Mackay, G.	22	34
Napier, J.	Scott, Mrs.	234	414

Defenders.	*Pursuers.*	No.	Page.
Nelson, J.	Anderson, H.	438	899
Nicolson, D.	Dunlop, R.	451	915
Ninian, Q. D.	Smythe, J.	6	8
Nisbet, A.	Smyth, C.	229	388
Noble, R.	M'Kenzie, T.	219	367
O'Henly, D.	Wright and Anderson,	184	311
Officers of State, &c.	Phin, J.	317	690
Officers of State, &c.	Wigtonshire, Commissioners of Supply of	359	767
Ogilvie, W.	Chalmers, D.	276	544
Oliver, T. and A.	Brown, J.	400	831
Orr, R.	Heritors and Kirk-Session of Glassford,	456	921
Oswald, R. A. &c.	Little, G.	283	558
Ouchterlony, J.	Lynedoch, Lord, &c.	216	358
Oughterson, J. &c.	Robertson's Trustee,	386	809
Park, R.	Waddel, W.	131	221
Parker, C. S.	Buchanan, A. (Collector of Poor Rates for the City of Glasgow,)	230	390
Paterson, D.	Pentland, G.	432	889
Patison, J.	Oswald, A.	81	127
Patison, J. jun.	Scott, T.	106	172
Paton, G.	Young, G.	94	151
Paul, H. &c.	Sutherland, D.	325	703
Peebles, C.	Greig, J.	345	733
Peterborough's Executors, Earl of	Representatives of J. Innes,	309	681
Pinkerton, R.	Alexander, A.	115	185
Pollock, Gilmour, & Co. &c.	Girdwood, C. and Co.	254	507
Porterfield, J. C. &c.	Duncan, J.	74	111
Porterfield, J. C. &c.	Houston's Executors,	75	115
Porterfield's Trustees,	Porterfield, J. C.	367	784
Pringle or M'Murdo, Mrs. &c.	Duke of Buccleuch and Queensberry,	305	677
Queensberry's Executors, Duke of	Duke of Buccleuch and Queensberry,	304	676
		305	677
	Hunter, W.	306	678
	Maxwell, M.	464	985
Railton, G.	Murs, W.	194	328
Ramsay, J.	Morrison, J.	93	150
Ramsay, W. R.	Scot, Rev. D.	220	367
Reid and Monach,	Lang, J.	13	21
Reid, A. &c.	Tetnall, J. B.	165	277
Reid, A.	Jobson, D.	332	715
Reid, J. and J.	Dunlop, R.	376	796

Defenders.	*Pursuers.*	No.	Page.
Renfrewshire Banking Co.	Saunders, G.	288	565
Rintoul, R. &c.	Anderson, A.	350	744
Robertson, Mrs. Ann	M'Neel, A. &c.	321	696
Robertson, Mrs.	Davidson, R.	354	751
Robertson, J.	Young, W.	249	482
Robertson, J.	Young, W.	251	502
Robertson, R. &c.	Smith and Tasker,	412	848
Robertson, W. &c.	M'Kenzie, D.	319	694
Romanes, J.	Gordon, R. &c.	59	91
Ronaldson, Mrs. &c.	Kay, A.	181	309
Rose, H.	M'Kenzie, M.	453	916
Ross, A.	Spence, W.	9	17
Ross, G.	Munro or Rose, Mrs. C.	294	605
Ross, W. &c.	Lockhart, Mrs. &c.	87	136
Roughead or Dickson, J.	Hunter, J.	235	417
Royal Bank of Scotland,	Gordon, A.	102	164
Sandeman, P.	Bruce, W. &c.	299	668
Scott, D.	Erskine, J.	366	783
Scott, J.	Clark, J.	73	109
Scott, W.	Cranstoun and Hay,	46	62
Scotland, Bank of	Smith, J. &c.	64	98
Scotland, Bank of	Padon, J.	109	175
Scotland, Equitable Loan Company of	Lennox's Trustee,	117	192
Scotland, Royal Bank of	Gordon, A.	102	164
Selkirk, Magistrates of, &c.	Hope, A. &c.	353	749
Shand's Trustee,	Earl of Aberdeen's Trustees,	337	724
Shaw, J.	Boyd, J.	233	413
Sheills, J. and Company,	Falconer, T. &c.	455	919
Shirra, W.	King, J.	138	231
Simpson, J.	Cochran, J.	314	687
Simson, W.	M'Lean, J.	18	29
Sinclair and Nisbet,	Hopkirk, T.	162	273
Smith, A. &c.	Dove, J. and W.	346	734
Smith, Jane	M'Kenzie, T.	116	189
Smith, J.	Campbell, J. jun.	373	794
Sommers, W.	Anderson, W.	36	49
Soutar, J.	Soutar, A. Representatives of	422	876
Spears, J.	Maccallum, A.	274	541
Spence, A. &c.	Magistrates of Lauder,	225	375
Spence, J.	Torry, A. &c.	398	825
Stair's Trustees, Earl of	Earl of Stair,	248	476
Stein, Misses	Stein, R. &c.	66	101
Stevenson, N.	Rowand, M.	442	903
Stewart, D.	Gibson, W.	380	803
Stewart, G.	Sim, D.	408	841
Stewart, W.	Barbour, G.	284	559
Stirling, Fleshers of	Dick, J.	159	268
Stirling, Sir S.	Fair, W.	176	306
Straton, D.	Gourlay, A.	381	804

Defenders.	*Pursuers.*	No.	Page.
Swan, H. &c.	Allan, R.	155	261
Tain, Magistrates of	Rose, H. &c.	447	911
Tait, C.	Duke of Queensberry's Executors,	112	180
		265	521
Taylor, A.	M'Kenzie, M.	457	925
Taylor, M. &c.	Mein, A.	364	779
Thom or Fiddes, Mrs. M.	Irvine, P.	272	534
Thomson, G. &c.	Sharp, J.	338	724
Thomson, J. T.	Murray, J. &c.	38	50
Thomson, J.	Napier, J.	295	656
Thomson, Mrs. &c.	Cunningham, M. &c.	390	814
Thomson, W.	Murray, R.	113	183
Thomson, W.	Megget, T.	164	275
Thornton, R.	Dye, J. &c.	114	185
Threshie, R.	Kirkpatrick, J.	287	565
Trotter, Sir C. &c.	Lockhart, Mrs. &c.	87	136
Trotter, W. &c.	Trotter, Y.	57	78
Trustees of Farquharson,	Scott, A.	320	695
Trustees of D. Kyle,	Trustee of T. Kyle,	122	203
Trustees of Shotts and Airdrie Road,	Aitken, R. &c.	84	135
Turnbull, J.	Pollock, W.	119	195
Turnbull, J.	Sharrat, S.	217	361
Turner, J.	Brown, J.	191	321
Underwood, W.	Marston, J. and M.	120	200
Underwood, W.	Martin, W.	365	783
Urquhart, Mrs.	Borthwick, P.	146	242
Virtue, J. and Company,	Horsefall, A. and J.	22	36
Walker, J.	Reid, Captain J.	90	140
Walker and Russell,	Crawford, J.	152	259
Walker, Sir P.	Gibson-Craig, J.	409	843
Walker, W. F.	Tutors, Earl of Eglintoun's	236	418
Walkinshaw, &c.	Gillespie, Wright, and Co.	357	764
Wallace and Dunn,	Austin, I. and S. &c.	110	177
Wallace, W. &c.	Cockburn, J. &c.	69	106
Wardrop, J.	Lawson, J.	86	136
Watson, Janet	Wright, J.	293	604
Wedderburn, H. S. &c.	Atholl, Duke of, &c.	95	153
Wedderspoon, W.	Hodge, P.	153	261
Welsh, W. A.	Forbes' Trustees,	249	497
Wemyss and Walker,	Brown, W.	328	703
White, Dr. &c.	Arrot, C.	260	517
Whitehead, Dr. R.	Rowat, J.	10	19
Wight, G.	Taylor, J.	377	797
Wightman, J.	Kennedy, A. &c.	415	852
Wighton and M'Kenzie,	Kilpatrick, W.	435	895

Defenders.	*Pursuers.*	No.	Page.
Wigton, Magistrates of	Commissioners of Supply of Wigtonshire,	359	767
Wills, J.	Gibson, Sir A. C. M.	52	74
Wilson, J. and Son,	Girdwood, C. and Company,	254	507
Wilson and M'Lellan,	Fleming, B.	445	906
Wilson, R.	Miller, T.	459	926
Wright, R. &c.	Borthwick, P.	171	293
Wright, T. &c.	Roy, W. &c.	70	107
Wyllie, Mrs. J. &c.	Hamilton, H.	333	716
Yorstoun, Rev. J.	Middleton, M. and E.	100	162
Young, Dr.	Ferrier, C. (Lyell's Trustee,)	196	332
Young, J. &c.	MacRitchies and Murray,	147	242
Young, J. &c.	De Witt, Mrs. Alletta	180	309

ERRATA IN VOL. V.

P. 34, Case No. 22. Ordinary's name, for *Lord Mackenzie* read *Lord Medwyn*.
P. 52, Case No. 40. for parties' names as at present printed, read merely *A. Millar, Complainer.—Sol.-Gen. Hope*.
P. 56, Case No. 43. Ordinary's name, for *Lord Eldin* read *Lord Medwyn*.
P. 85, line 7. from foot, for *heirs* read *heir*.
—— line 15. from foot, for *freehold and copyhold* read *freehold or copyhold*.
P. 186, line 24. for *Ardrossan* read *Kilbride*.
P. 287, line 6. for *consumpte* read *consumptæ*.
P. 341, line 1st of title of No. 207. for *had who* read *who had*.
P. 352, line 1. for 1822 read 1812.
P. 367, last line of No. 219. for 1820 read 1826.
P. 408, line 14. for 1772 read 1672.
P. 425, last line, for *absolute effect of* read *effect of absolute*.
P. 506, line 35. for *suspended* read *superseded*.